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Public Interest Influences in Competition Law – A Comparative Analysis of South Africa and Germany

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Signed by candidate

Tim Willing

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List of Abbreviations

Art	Artikel (article)
ARC	Gesetz gegen Wettbewerbsbeschrankungen (Act against Restraints of Competition)
BEE	Black Economic Empowerment
BBBEE	Broad Based Black Economic Empowerment
BKartA	Bundeskartellamt
BMWi	Bundesministerium für Wirtschaft und Technologie
EC	European Community
EU	European Union
NEHAWU	National Education Health and Allied Workers Union
s	section
SACCAWU	South African Commercial, Catering and Allied Workers Union
SMME's	Small, Medium and Micro-sized Enterprise

Public Interest Influences in Competition Law – A Comparative Analysis of South Africa and Germany

A. Introduction

Public interest influences and policies play a role in almost every country with competition law legislation. However, the systematic position of public interest considerations and the extent of practical influences differ.

South Africa and Germany stand exemplary for these differences. In both jurisdictions there are recent debates on how much weight should be given to public interest factors, particularly employment. In South Africa, the recent merger case of Walmart/Massmart decided in 2011 gave rise to further discussions and in Germany there is a still pending application for ministerial authorisation ('Ministererlaubnis') for the EDEKA/Tengelmann merger[1]. Due to the historical development and the systematic relevance of public interest factors in both countries, the number of cases involving public interest considerations differs noticeably between South Africa and Germany.

In South Africa, where the public interest test is a mandatory part of a merger review there is a variety of cases in which the Commission is trying to weigh the negative competitive effects against public gains. And it has become increasingly important over the last four to five years.

Whereas in Germany, where public interest considerations lie outside the general merger review and are only taken into consideration on application by the parties, there are no more than 22[2] cases since 1973 containing such deliberations.

This thesis will start by representing the legal framework of competition law, in particular merger control, in Germany and especially evaluating the case law and the question of balancing, arising from § 42 I ARC in more detail. I will then look at the cases of ministerial authorisation applications in Germany examining the most important public interest grounds and how they were weighted against restraints of competition. Afterwards, I will turn to South African competition law and examine the same questions specifically looking at the public interest test. I will then go on to compare and present in detail in which ways the systems and legal practice differ and provide a brief outlook of the future of public interest influences in the competition regimes. In the end I will point out the advantages and disadvantages of each system and whether this leads to the conclusion that legislation or practice in these jurisdictions

[1] Status as of March 2016.
[2] Wiedemann/*Richter*, § 21 Rn 128, whereby eight of the applications have been withdrawn during the process; http://www.bmwi.de/BMWi/Redaktion/PDF/Wettbewerbspolitik/antraege-auf-ministererlaubnis,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.

should change in the future. The final findings will try to provide a recommendation on how balancing should be used to come to fair and satisfactory results in future merger cases and sum up the possible influence of the South African model on other merger regimes.

B. Public interest influences in Germany

Public interest aspects do not play a role in the merger control under the German competition law unless a party applies for a ministerial authorisation as described in § 42 ARC which allows the Minister of the BMWi (Federal Ministry of Economics and Technology) to consider non-competition aspects.

I. Main elements of German competition law

Germany has one of the most developed competition law regimes in the world. It is laid down in the Act against Restraints of Competition (ARC). Its aim is to protect competition within the Federal Republic of Germany.[3] After coming into effect in 1958 it has been updated via numerous amendments. The amendment in 1973 encompassed the introduction of a national merger control regime long before it was introduced at European Community (EC) level in 1989. Since then, merger control plays an increasingly vital role in competition practice in Germany with 1,188 notified concentrations in 2014[4]. The provisions governing merger control today, which I will focus on for the research purposes of this thesis, are §§ 35 ff ARC (Chapter Seven on the Control of Concentrations). The purpose of the control described in Chapter Seven is primarily market structure control. The generally pro-competitive external corporate growth through mergers can lead to anti-competitive market powers and is therefore controlled by a preventive system of prohibition subject to authorisation.[5]

In most parts it is equivalent to Art 101 ff Treaty on the Functioning of the European Union (TFEU) at the EU level. Through the EU legislation German merger control lost some of its weight. The European Commission functions as a one stop shop for mergers

[3] http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Brosch%C3%BCren/Informationsbrosch%C3%BCre%20-%20Das%20Bundeskartellamt%20in%20Bonn.html?nn=3590338.
[4] http://www.bundeskartellamt.de/DE/Fusionskontrolle/fusionskontrolle_node.html
[5] Immenga/Mestmaecker/*Thomas*, GWB Vorbem § 35 Rn 1-2, the German merger review system today follows a preventive approach.

with community wide dimension generally[6] excluding national review on these cases (See § 35 III ARC, Art 21 Section 3 Subsection 1 EC Merger Regulation respectively).[7]

Where there is no EC competence, mergers can be subject to review by the BKartA (Federal Cartel Office). Pursuant to § 35 I ARC, it is therefore generally necessary that the merging parties meet certain thresholds consisting of a worldwide (EUR 500 million) and national turnover (EUR 25 million respectively 5 million) as cumulative requirements.

In the case of national competence for the matter, the competition test described in §§ 36-41 ARC has to be applied. First, § 37 ARC describes the different variants of a concentration. If the concentration leads to a significant impediment to effective competition, especially through the creation or strengthening of a dominant position as required in § 36 I ARC, the BKartA will prohibit the proposed merger according to § 40 ARC. The analysis applied for the impediment to competition involves a double hypothetical assessment comparing the hypothetical competitive relationships in the future with and without the concentration.[8] First, the BKartA looks at the market structure and asks whether the presumptive example of the creation or strengthening of a dominant position is applicable. If it is not, the competition authority goes on evaluating the restraint of effective competition pursuant to the SIEC-test ('significant impediment of effective competition').[9] When examining the fulfilment of one of the alternatives, the BKartA needs to apply an overall view including all relevant factors - but the analysis by the BKartA is strictly restricted to negative and positive **competition aspects**.[10]

Although the EC Merger Regulations are purely concerned with competition aspects[11] there are several European Member States with national competition regimes which include the additional possibility to allow a merger on non-competition grounds. [12]

In Germany, § 42 ARC provides for the possibility of a ministerial authorisation of mergers which previously have been prohibited[13] by the BKartA. With this § 42 I ARC splits the responsibility in merger cases between the Federal Ministry of Economics and Technology and the Federal Cartel Office. § 42 ARC turns the merger control in

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[6] Upon application, the Commission is able to relegate cases to the national competition authorities, see Art 4 paragraphs 4, Art 9 EC Merger Regulation; furthermore, big mergers can stay in competence of the BKartA pursuant to the two-thirds rule in Art 1 II, III EC Merger Regulation.

[7] The German merger control therefore only takes effect where the merger does not meet the thresholds of Art 1 EC Merger Regulation, cases of non-controlling minority stakes and partial-function joint ventures.

[8] Thomas op cit (n5), § 36 Rn 13.

[9] Ibid Rn 16.

[10] Ibid Rn 24-25.

[11] Only 'exception' is the efficiency defence in Art 2 I b) ECMR.

[12] Thomas op cit (n5) §42 Rn 12.

[13] Mergers which are subject to a winding-up order are treated equally.

Germany – in case of application by one of the parties – into a two-step procedure. First, the BKartA examines the merger in line with the provisions of §§ 35 – 41 ARC and rules a decision on the merger. If it prohibits the merger (or issues a winding-up order)[14], the parties are left with the ultimate possibility to make an application to the Minister for authorisation of the merger.

II. The ministerial authorisation in detail

In order to be granted a ministerial authorisation the formal and substantial requirements must be met.

1. Formal requirements

The formal requirements for a ministerial authorisation especially include the application for authorisation after the prohibition or winding-up order by the BKartA, see § 42 I 1 ARC (principle of 'ne ultra petita'). Corresponding to § 54 II No. 4 ARC, the application can also be made by the seller within the respite of one month.

Importantly, § 42 IV 2 ARC requires the Minister to consult the monopolies commission for an expert opinion. Just like the Minister, the monopolies commission is bound by the findings of the BKartA on the competition impacts in terms of § 36 I ARC.[15] The right of the higher regional state authority to deliver an expert opinion as laid down in § 42 IV 2 ARC is of less practical importance. The expert opinions have no legally binding effect on the Minister.[16] Furthermore, § 56 II 3, sub clause 1 ARC provides for a public oral hearing by the BMWi. The final decision-making competence lies materially with the BMWi and functionally with the Minister[17] who has to deliver his decision within four months after the application (see § 42 IV ARC).

2. Substantive requirements

The law on the substantive requirements appears to be very clear and simple, if you look at it superficially in the first place. § 42 I ARC is structured in a way that it first provides for two groups of cases in which a ministerial authorisation might be granted (sentence one), points out a specific factor to consider when deciding whether a specific case fulfils one of the before mentioned categories (sentence two) and lays down a condition under which the possibility of an authorisation is excluded (sentence three).

What makes the application of the law difficult is the imprecise wording and the subsequent problems of interpreting the law when dealing with undefined legal terms.

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[14] Thomas op cit (n5) §42 Rn 10: the legislator assumes that a winding-up order can be issued without a prior prohibition of the merger although this in practice will only happen in conjunction with a suspensory condition.
[15] Ibid Rn 38; for more detail on the binding effect see B,II,3,b.
[16] Bechthold, § 42 Rn 18.
[17] Ibid Rn 17.

For the first alternative these include the interpretation of 'advantages to the economy as a whole' as well as 'outweighed' and for alternative two 'overriding public interest' and 'justified'.

While 'outweighed' and 'justified' are only concerned with the degree of advantages or extent of the overriding public interest, it is first to ask what the meaning of the undefined terms described in § 42 I 1 ARC is, what it entails and which cases fall under the two alternatives.

a. Alternative one - advantages to the economy as a whole

For logical reasons it is better to examine 'advantages to the economy as a whole' first when looking at the two terms. The reason being is that although a clear distinction cannot be made, the first alternative is to be seen as a subcategory of the second alternative specifying on economic aspects.[18]

The wording of the law speaks of 'advantages' which can generally include any positive effects. A restriction is made through adding the requirement that these advantages have to be advantages 'to the economy as a whole'. It is therefore primarily concerned with the **economic** advantages of the concentration. 'To the economy **as a whole**' stands in contrast to individual economic advantages which cannot constitute a reason for ministerial authorisation.[19] This excludes especially effects **only**[20] beneficial for the concentrating or third parties and calls for broader grounds for justification.[21] It does not contradict the wording of the statute that under special circumstances also merely regional effects can trigger advantages to the economy as a whole.[22] The same applies to advantages to single economic sectors.[23] It is therefore clear that 'as a whole' cannot be interpreted as advantage to every participant involved in the economic life.[24] This would lead to an extensive narrowing of the scope of application making it impossible to meet the requirements. In conclusion, for the advantages to fulfil the requirements, the direct effects can possibly be narrow as long as it ultimately brings economic advantages to the German economy as a whole.

Indications of what these economic advantages might be in concrete terms can be drawn from the systematic of the regulation itself. Following § 42 I 2 ARC it is explicitly required to take into account[25] considerations concerning the competitiveness of the participating undertakings in markets outside the scope of application of the ARC. In

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[18] Richter op cit (n2) Rn 135.
[19] Cf Begründung Reg.-Entwurf 1971, page 31.
[20] Veba/BP, page 507: it is not detrimental if the macroeconomic advantage matches with economic benefits of the merging entities.
[21] Cf Universitätsklinikum Greifswald page 692.
[22] Ibid page 693.
[23] Loewenheim/Meessen/Riesenkampff/Riesenkampff/*Lehr*, GWB 42 Rn 5.
[24] Cf Ibid Rn 6.
[25] Langen/Bunte/*Kallfaß*, KartellR, § 42 Rn 8.

particular terms, this means that authorisation can be granted on grounds of preservation or improvement of international competitiveness of German firms on foreign markets (see B, III, 3).[26]

Looking into the explanatory memorandum of § 24 III ARC (old version), today's § 42 I ARC, the economic goals of a stable price level, high employment rate, external equilibrium and continued and balanced growth have to be taken into consideration when applying the regulation.[27] Therefore, economic advantages based in these fields are generally suitable for a ministerial authorisation. Moreover, based on the intent of the legislator it is necessary that these advantages have at least a medium-term effect.[28]

In addition, the advantages described above need to 'follow from the concentration'. The concentration must be the cause of the advantages weighed against the restraint of competition.[29] Although systematically referring to alternative one, the requirement of a causal link must logically also apply to overriding public interests. Nevertheless, there is no indication of a requirement that the merging firms need to intentionally promote the advantages.

b. Alternative two – overriding public interest

The second alternative requires an overriding of public interest. As I stated before, this term is wider than and cannot be strictly separated from alternative one.

Again, the wording - 'public interest' - can be interpreted in a very broad sense and is only restricted by the adjective 'overriding' which calls for a certain qualitative element. From its original meaning an interest is something which has great importance or is very useful for something or someone. Someone in the case of 'public interest' is the public as the entirety of people in Germany. Hence, interpreting the plain wording, the term is of seemingly 'infinite extensibility'[30]. Even when including 'overriding' in the meaning of exceeding someone or something comparable in importance, the wording is not precise enough to apply the regulation in a concrete and distinct manner.

To narrow the scope of the term it is therefore useful to take a look at the legislator's intention. Because there is no clear differentiation between the alternatives, the explanatory memorandum also does not differ by demanding for a general political, economic or socio-political justification.[31] Nevertheless, economic justification grounds can be assigned to alternative one so that public interests stand for the political and socio-political considerations. Through the second alternative it was intended to give

[26] Lehr op cit (n23) Rn 8.
[27] Begründung Reg.-Entwurf 1971, page 31.
[28] VEBA/Gelsenberg; differentiating between the alternatives with a stricter requirement of permanent effect for advantages to the economy as a whole, Thomas op cit (n5) Rn 84.
[29] Kallfaß op cit (n25) Rn 2; Bechtold § 42 Rn 8.
[30] Ibid Rn 5.
[31] Begründung Reg.-Entwurf 1971, page 31.

the Minister the right to take appropriate considerations into account, which lie outside the economic scope. Important factors for the interpretation are general policy decisions and statements of the Federal Government ('Bundesregierung') which lay down the guidelines for the desired economic and general development in Germany.[32] In addition, it is also necessary to note the general developments of the economic order and public morals.[33]

In the Universitätsklinikum Greifswald case, the Minister lists social, educational, research, regional and health policies as possible justifications.[34] Further exemplary grounds for justification stem from the legal, ethical, cultural, defence policy, environmental or social field.[35] This widespread range of public interest grounds shows that there is no comprehensive 'case law' that specifies certain narrow interest factors capable for ministerial authorisation grounds but rather there are many different factors having the possibility to serve as overriding public interest. One can even think of other potential public interests far off economic considerations like health, justice and freedom.[36] These often very different grounds are difficult to compare and make it hard to find a general guideline for orientation.

The adjective 'overriding' is supposed to restrain the public interest grounds to cases of great significance.[37]

3. The central question of balancing competition aspects against political policy goals

Parties will only make an application for ministerial authorisation if the concentration has positive effects of which at least they are convinced will trump the negative competition restraints. Therefore, possible positive and negative effects of a merger have to be evaluated and, if necessary, balanced against each other in the case of a § 42 ARC application.

Assessing at which point one set of interests has to be given priority to the detriment of concurring interests is a central question not only in competition law but runs through all fields of law which are based on and need to conform with the Constitution ('Grundgesetz' or 'GG') and its basic principles.

[32] Kallfaß op cit (n25) Rn 5.
[33] Thomas op cit (n5) Rn 89.
[34] Universitätsklinikum Greifswald page 692.
[35] C.f. Thomas op cit (n5) Rn 89; Richter op cit (n2) Rn 136.
[36] Basedow page 417.
[37] Begruendung Reg.-Entwurf 1971, page 31: "are of great significance in the individual case"; differing view Bechtold op cit (n29) Rn 7.

a. Constitutional necessity for proportionality within the merger control

Before looking at the complexity of balancing itself - especially in view of § 42 I ARC - it is important to understand why and how fundamental values and the proportionality rule can also be of influence to the result of balancing in the merger review context.

Balancing and proportionality are fundamental ground rules laid down in the Constitution in Article 20 III derived from the rule of law and therefore governing the ordinary law in general including the ARC. The state is not allowed to intervene into the rights of the citizens without sufficient justification. In that sense, Art 20 III GG prohibits the state to intervene in an extensive manner ('Übermaßverbot'). Therefore, the state action lacks a sufficient justification where the interests were not balanced in the right way achieving proportionality between the different values in conflict (practical concordance). Constitutional concerns are invoked especially when the state prohibits an individual from exercising his freedom but also in cases where the admission to one individual interferes with the freedom of another individual.

Therefore, in the merger control context this constitutional limit not only has impact on the application of § 42 ARC, but can in extreme cases already hinder the BKartA from prohibiting the merger pursuant to § 36 I ARC.

The concentration control pursuant to § 36 I ARC interferes with the fundamental rights guaranteed in Art 12, 14 and 2 I of the Constitution, especially the entrepreneurial freedom and the right to property which include the guarantee of freedom to merge with other companies. The basic legal capacity of a legal person follows from Art 19 III of the Constitution.[38] The legitimate purpose of § 36 I ARC is to prevent the creation or strengthening of market-dominating positions and the protection of the free market conditions. Where the requirements of § 36 I ARC are fulfilled, it generally does not raise further proportionality concerns.

The ministerial authorisation in terms of § 42 I ARC shall be granted if the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest. Such an approval pursuant to § 42 ARC interferes with the rights of third parties, especially competitors of the merging parties and is therefore also subject to the constitutional principle of proportionality.[39]

In the same manner as the prohibition of a merger, the granting or denial of authorisation has to be suitable, necessary and **proportionate**. The ministerial authorisation is suitable to promote the objective of public-interest benefits if it contributes to the realisation of the objective or makes it more likely.[40]Approval is not

[38] BeckOK GG, Art 19 Rn 34
[39] Thomas op cit (n5) § 42 Rn 117.
[40] Ibid Rn 118.

necessary if an alternative purchaser exists and a merger in this case would not trigger a prohibition pursuant to § 36 I ARC[41] or if there is no causal link between the concentration and the benefits which makes it indispensable.[42] **Proportionality in its narrow sense** is the final and central question of proportionality considerations. For this reason, it needs to be examined in some detail as follows.

b. Proportionality through balancing in accordance with the constitution

State measures are proportionate when a balancing of all circumstances leads to the result that the objective pursued is not disproportionate in relation to the degree of seriousness of the infringement.

aa. General aspects

Weighting of different interests and concerns is a pivotal part of law making and law finding[43]. Balancing is characterised by the fact that the decision is to be made in view of the peculiarities of the case at hand.[44] Nevertheless, balancing has to be as transparent and reviewable as possible and cannot be seen as a magic tool in the hand of the final decision-making body.[45] Therefore, certain measurements have to be applied to make the decision-making process comprehensibly rational.

The decision authority needs to follow the basic principles of logic. Furthermore, the decision body always needs to include all aspects which are available and came to his knowledge and weigh them according to common measurement policies such as the different weight and importance of constitutional rights (eg absolute protection of life in Art 2 II 1 GG or importance of freedom of speech and freedom of the press as well as freedom of assembly as democracy constituting constitutional rights arising from Art 5 I and Art 8 I GG). Another fundamental rule is not to include extraneous considerations in the assessment.

Although, executive authorities have great discretion when the decision involves valuations and prognoses, balancing always needs to be in conformity with the fundamental principles just described.

Before balancing it is important to specifically name the legal interests which are in question in the particular case. Afterwards, one needs to describe their general

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[41] Universitätsklinikum Greifswald page 685; see also Lehr op cit (n23) Rn 9; differing view that a less harmful merger does not hinder the entitlement to a ministerial authorisation Richter op cit (n2) Rn 138 and agreeing for the case that the less harmful alternative has no chance of implementation Thomas op cit (n5) § 42 Rn 120.
[42] Thomas op cit (n5) § 42 Rn 120.
[43] C.f. Thyssen/Hüller, page 668 "principle of proportinonality […] is of overwhelming importance in administrative law".
[44] Gassner, page 119.
[45] Ibid page 119.

importance before examining the weight they should be given in the case at hand. Ultimately, these considerations shall then determine the outcome of the balancing.

bb. Balancing in terms of § 42 I ARC

On the face of the law, there are competition restraints on the one side. 'Restraints of competition' in the sense of § 42 I 1 ARC primarily means the findings of the BKartA on impediments to effective competition upon the application of § 36 I ARC.[46]

The underlying purpose of prohibiting, respectively not authorising an intended merger is always to protect the market. The abstract importance of a functioning competition market free from any impediments is very high. Not only does it serve the main purpose to protect the structure of the market and thus competition as an institution but in fact ultimately also prevents harm from consumers.[47] In addition, the purpose of merger control in Germany to protect market participants as well as competition itself as an institution is a complementary partner of private autonomy.[48] Functioning markets are of fundamental importance to a society and economy as a whole. The weight of the net welfare loss[49] which results from the concentration of market power can be immense. Of course, this general assumption always has to be seen in the light of circumstances of the particular case.

This brings up the question if and to what extent the Minister is already bound by the findings of the BKartA. Generally, the two-step system with the clear distinction between the competition analysis of the BKartA and the outside competition considerations by the Minister implement that he cannot review the decision of the BKartA and is bound by its underlying factual and legal findings.[50] Nevertheless, the Minister is also subject to constitutional obligations arising from Art 20 III of the Constitution ('executive authority […] bound by law and statute') so that exceptions have to made in the case of evidently implausible, speculative or contradictory findings[51] by the BKartA. Furthermore, the Minister has the power to decide upon the significance of the restraint of competition at due discretion[52] and can undertake his

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[46] Bechtold, op cit (n29) Rn 7.
[47] Thomas op cit (n5) Vorbem § 35 Rn 4-5, where he states that the introduction of the SIEC test leads to an increasing consideration of effects on consumers.
[48] Ibid Rn 4.
[49] Net welfare loss or deadweight loss is the result of monopolies which can possibly lead to too much or too little production and consumption of a good or resource.
[50] C.f. Lehr op cit (n23) Rn 92-3.
[51] Thomas op cit (n5) § 42 Rn 75; for legal review in case of implausible findings see already Daimler/MBB page 956; differing view Bechtold, op cit (n29) Rn 5, who states that the Minister should be able to freely review the findings of the BKartA.
[52] Lehr op cit (n23) Rn 3.

own additional investigations[53]. For weighing the competition effects, the Minister is also allowed to include eventual competition advantages in his considerations.[54]

When determining the significance of the market dominance, the Minister has to include all resources of the merging parties in his considerations, including but not limited to the financial capacity, access to the procurement and sales markets and interconnections with other companies as well as legal and factual barriers for the market access of other companies.[55] Facts, which arose after the decision of the BKartA logically also need to be included in the evaluation of the Minister.[56]

Restraints of competition are evaluated by the market impact, the extent and the probability of occurrence.[57] Not only the additional anti-competitive effects but also the degree of the restraint of competition in total has to be taken into consideration which is especially important for markets with dominant firms pre-merger.[58] In more detail, it is thereby necessary to evaluate the effects on the competitors, products and innovations within the market.[59] Socio-politically negative effects of a merger cannot be included in the assessment.[60]

The weight on the other side of the balance consists of one or more public interest gains in the form of advantages to the economy as a whole or overriding public interest as described above (see B, II, 2, a-b). Essentially, this part is concerned with finding a partial compliance of the commercial interest to merge and public interests.[61]

The diversification of possible public interest gains makes it hard to evaluate an abstract importance. For the first alternative, the wording ‘to the economy as a whole’ shows that these grounds need to have some weight and that benefits for the economy ideally lead to gains for everyone within the society. The second alternative can relate to legally protected rights of varying importance (cf the Holtzbrinck merger case: freedom of the press and press diversity as matter of enormous importance). In that sense, for the evaluation of the positive effects one needs to look at the weight, the duration of the gains outside of competition and the competitive advantages of the concentration.[62]

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[53] Richter op cit (n2) Rn 135.
[54] Kallfaß op cit (n25) Rn 10.
[55] VAW/Kaiser page 702.
[56] Bechtold, op cit (n29) Rn 4.
[57] Universitätsklinikum Greifswald page 689.
[58] Daimler/MBB page 956.
[59] Ibid page 965.
[60] Ibid page 962.
[61] Holtzbrinck/Berliner Verlag page 638.
[62] Thomas op cit (n5) Rn 121.

If the negative and positive **non-competitive** effects of the merger lead to an ultimately positive balance in terms of one of the two alternative requirements[63], these have to be weighed against the negative effects on **competition**.[64]

As a starting point it always has to be kept in mind that protecting competition is the rule and the ministerial authorisation only an exception to it (see § 42 I 1 ARC 'in a specific case').[65] All of the factors which need to be considered on the one or the other side stand in relative relation to each other so that the weight of the advantages needed to equalize the competitive disadvantages is oriented at the severeness of the restraint of competition.[66] An absolute grade of relevance is not necessary.[67] It is questionable which level of advantage is necessary for a ministerial authorisation. An 'offsetting' (better than the official translation of 'outweigh') and therefore the absence of a negative balance should be sufficient – in contrast to the requirement to 'outweigh the disadvantages' in § 36 I ARC.[68]

Although the Minister is left with a wide discretion in interpreting, he has to primarily orientate towards the fundamental commercial policies.[69] Furthermore, it has to be kept in mind that merger are generally permanent and not reversible. Therefore, the advantages also need to be permanent in order to qualify for an authorisation.[70]

He uses qualitative and quantitative consideration factors to determine the effects on competition, especially: volume of the market, economic importance of the markets and degree of effects on the market structure. In addition, potential disadvantages to the economy as a whole or impediments to overriding public interest have to be taken into consideration.[71] From a qualitative perspective it can be said that: the bigger the scope for the residual competition from a macroeconomic perspective, the smaller the degree of restraint of competition.[72] But the decisive factor is the quantitative weight of the restraint. It can be drawn from the volume of the affected markets, market shares and market share advantage in comparison to other competitors.[73] The quantitative criteria is not to be determined by the relation between the domestic and foreign market to not advantage big international firms.[74]

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[63] Bechtold, op cit (n29) Rn 7.
[64] In practice, a balancing is only conducted where 'substantiality' and 'causality' are proven (see B, III, 5).
[65] Cf Begruendung Reg.-Entwurf 1971, page 31.
[66] Cf Thyssen/Hüller.
[67] Bechtold, op cit (n29) Rn 7; in contrast to older decisions see VAW/Kaiser page 703.
[68] Lehr op cit (n23) Rn 9; Richter op cit (n2) Rn 137; Kallfaß op cit (n25) Rn 10; differing view requiring a "positive balance" see Thomas op cit (n5) Rn 128.
[69] VEBA/Gelsenberg page 345.
[70] Lehr op cit (n23) Rn 9.
[71] Thomas op cit (n5) Rn 128.
[72] MAN/Sulzer page 251.
[73] Universitätsklinikum Greifswald page 690.
[74] MAN/Sulzer page 250.

On the face of the law, § 42 I ARC requires not more than a balancing of the two contradicting sets described above by looking at the time and probability of occurrence, geographical scope and content of the restraint of competition on the one hand and common welfare grounds on the other hand.[75]

But in the sense of a comprehensive constitutional evaluation of the cases, **all competing interests** have to be taken into account. Thereby, the different interests; namely the interest of the parties to a proposed concentration to merge, the public interest to achieve the biggest economic benefit possible and the interest of third parties to maintain functioning competition need to be brought in balance (triad of interests).[76]

Aside from these theoretical guidelines, the crucial underlying problem of balancing these factors against each other is that they are not directly comparable. A comparison requires that the subject matters to be compared have at least one feature in common. It might be possible to find these factors in certain constellations when opposing the § 36 ARC results and economic advantages pursuant to alternative one of § 42 I ARC.[77] Nevertheless, this element called 'tertium comparationis' is certainly non-discernible when trying to balance overriding public interests with disadvantages to competition.[78] This is the root cause for difficulties in § 42 ARC cases. It makes the decision-finding very complex and hard to review and therefore often times also subject to criticism.

Although there are various economic models which have developed over the years of competition practice and try to capture the effects on the markets, the concentration effect are difficult to determine. In Germany, this led to the introduction of the SIEC-test[79] through the 7th Amendment to the ARC shifting away from a purely market structural approach to an effects-based approach. This is consistent with the general trend to increasingly use economic methods in competition law ('more economic approach'). Based on the assumption of a reliable economic evaluation as to the effect of a concentration, the most straightforward solution to the balancing problem would be to also evaluate the advantages on an economic level. But lacking reliable tests and empirical factors or numbers with which economic gains of future public interest advantages can be described – at least where they are not direct economic gains – this approach is challenging if not impossible to pursue for the Minister. Of great importance in the ministerial authorisation considerations today is the employment factor. Consequently, the questions in this context are: what value can be attributed to a certain number of jobs, what influences their value and finally, how can this be compared and balanced against competition restraints. Some of these questions are

[75] Universitätsklinikum Greifswald, page 695.
[76] Bischke/Brack, page 750.
[77] Thomas op cit (n5) Rn 128 speaks of a general absence of comparability with the factors described in § 42 ARC.
[78] Richter op cit (n2) Rn 136.
[79] Which stands for „significant impediment of effective competition"-test.

reflected in the cases brought before the Minister. Therefore, it is worth taking a closer look at the public interest concerns that have been raised and how the Minster dealt with the complexity of balancing in the past practice.

III. Case studies

The law itself in § 42 I ARC makes clear that the decisions always have to be made based on a case-by-case analysis. For further specification, it is therefore pivotal to look at the case practice to get a sense of the conditions under which the exemption of the ministerial authorisation can be granted.

Considering the introduction of the ministerial authorisation over 40 years ago, there has been a fairly little number of applications. Furthermore, the prospect of success seems to be rather moderate with seven authorisations in total out of which only three have been granted without further obligations so far.

The decision practice encompasses evaluations on a number of different common welfare considerations. It is the object of this chapter to show the range of public interest grounds falling under one of the two alternatives and which are capable of weighing up the competition restraints in the sense of § 42 I ARC and to demonstrate in excerpts how the factors are balanced against each other in the individual cases. I will thereby focus on grounds for approval which can also be found in the centre of discussion in South Africa with regard to the public interest test, in particular the justifications including employment effects.

1. Job retention

As described above (B, II, 2, b) the common welfare considerations in § 42 I ARC can be specified by general policy goals. The national objective of macroeconomic equilibrium is laid down in Art 109 II GG and sub-constitutionally put into concrete terms by the 'Gesetz zur Förderung der Stabilität und des Wachstums der Wirtschaft' (StabG). § 1 StabG speaks of a high level of employment and makes full employment to a policy goal which needs to be considered when evaluating § 42 I ARC grounds.[80]

a. Babcock/Artos

Babcock/Artos was the first case brought to the BMWi for authorisation on grounds of job preservation. Noticeably, like other early decisions it deals with a merger which had already been put into effect[81] and in the end led to a ministerial authorisation subject to conditions.

[80] IBH/Wibau page 181.
[81] Before the introduction of a preventive system.

In this decision, it was made clear that job retention plays an important role, especially in economically underdeveloped regions.[82] At this early stage, the Minister already clarified that a misuse of the argument needs to be prevented keeping in mind that experience shows that concentrations almost always are aimed at rationalisation effects including the cutting of jobs[83]. Hence, there are high standards of proof to be applied when parties claim that not allowing the merger in question would lead to permanent job losses, especially if the concentration has already been implemented.[84] Another finding in this case is that an increased risk of job loss in other firms is only to be put in the balance if it is caused by the merger and its resulting structural changes on the market.[85]

In contrast to the monopolies commission who speaks of a more than remote degree of restraint of competition, the Minister stresses that the volume of the market was just above, by now clearly below the statutory threshold.[86] It is without doubt that the company would have exited the market without the concentration and therefore all jobs would have been lost which stands in comparison to the job cutting of 650 people that actually happened after the merger.[87]

In combination with two obligations imposed, the Minister came to the result that the negative competition restraints are outweighed and in the end authorised the concentration.

b. Thyssen/Hüller

In Thyssen/Hüller, the Minister responds more precisely to the question of the degree which job preservations must have in order to be considered a sufficient non-competitive gain. It is stated that § 42 I ARC calls for a macroeconomic consideration which is to be seen different from the preservation from jobs in single companies.[88] In addition, the decision requests to take into account that the preservation of jobs might conflict with the competitiveness of the German economy and therefore in the end might bear the risk of even greater job losses.[89]

Following experience, it is also found that there is a market deterrent effect beyond the direct effect of the concentration. Because in cases like this, with large companies entering a market of predominantly small and medium-sized firms, these former competitors try to look for a potent partner, which is ultimately leading to further

[82] Babcock/Artos, page 660.
[83] Ibid, page 660.
[84] Ibid, page 660.
[85] Ibid, page 661; see also Thyssen/Hüller, page 666.
[86] Babcock/Artos, page 660.
[87] Ibid page 661.
[88] C.f. Thyssen/Hüller, page 666.
[89] Ibid page 666.

restraints of competition.[90] Furthermore, a strong demand side is not capable of lessening the deterrent effect to a great extent, also because it is based on vague assessments of future market behaviour.[91]

Examined more closely, it can be stated that the case primarily dealt with the preservation of know-how and international competitiveness which according to the Minister only could be reached through the job preservation keeping the team of highly specialized experts together. Job preservation itself was not the focus because the majority of experts who would have lost their jobs most probably would have found a new job within a short period of time.[92]

c. IBH/Wibau

The negative effects on the market in this case are evaluated to be low. The reason behind it is that the volume of the market is just above the de minimis threshold, tends to stagnate and production stemming from this market is mostly sold on export markets with stronger competition.[93]

Again, it is referred to the usual concepts of mergers claiming that at least in the long term mergers are aimed at a systematic and gradual job cutting.[94] Additionally, looking at the economy as a whole, it is also emphasized that the negative impacts on competition might adversely and ultimately lead to negative effects on secured jobs in other companies.[95]

Nevertheless, in this case the Minister deviated from some earlier general assumptions stating that it is likely that jobs will be preserved on the long term or even be increased and the strong export orientation of the market makes it unlikely that jobs of other competitors in the German market will be at risk.[96] Furthermore, it has been acknowledged that the common welfare ground of job preservation and the employment policy goal plays an increased role in times of high unemployment.[97]

Again, the job preservation argument was not the predominant argument for allowing the merger in this case. Although only the two arguments brought forward together led to the ministerial authorisation, the decisive factor was the international competitiveness

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[90] Ibid page 665.
[91] Ibid page 666.
[92] Ibid page 667.
[93] IBH/Wibau page 165.
[94] Ibid page 166.
[95] Ibid page 166.
[96] Ibid page 166; the monopoly commission expected a preservation of 700 and creation of additional 500 jobs.
[97] Ibid page 167: at the same time emphasizing that flexible price and supply structures are vital for high employment rates.

which as a consequence had the additional positive effect of job preservation and creation.[98]

d. Kali + Salz/PCS

The parties in this case bring forward that an authorisation should be granted because the merger would have the effect of significantly improving the international competitiveness of K + S GmbH and preserving jobs.

The parties were not able to prove that there are positive effects rooting from the merger that outweigh the restraining effect of the concentration. The special finding in this case was that in the end, the perpetuation of internationally uncompetitive structures endangers jobs which could have been upheld in the case of necessary adjustment measures.[99] In addition, the general rule that concentrations regularly lead to higher job losses than maintaining the single firms in the competition was applied once again.[100]

In this case, the merging entities failed to prove that there is a causal link between the concentration and a lessening of risk for the competitiveness of the firm and ultimately securing of jobs. Following, the case is dismissed for a reason making the evaluation of the weight of this possible common welfare ground unnecessary and therefore does not entail new specific findings on the balancing of competition restraints against job preservation.

e. E.ON/Ruhrgas

A peculiarity in this case lies in the fact that E.ON and Ruhrgas are not competitors and the decision is therefore concerned with a vertical concentration.[101] It caught massive public attention because the Minister authorized the merger against the findings of the experts' report of the monopolies commission.[102]

The quantitative weight of the restraint of competition is significant because of the turnovers and market volumes; for the qualitative weight it was differentiated between the markets concluding that there is a relatively significant restraint of the market for gas.[103]

The findings in this case promote that there has to be a strict differentiation between positive effects on the job market which are due to the concentration and those which

[98] Ibid page 165-166 and 168.
[99] Kali+Salz/PCS, page 746.
[100] Ibid, page 746.
[101] E.ON/Ruhrgas, page 752.
[102] Ibid, page 757.
[103] Ibid, page 761.

are merely a consequence of the general demand growth and increase of the market. It is stated that the positive effects are more likely to be attributed to the latter.[104]

Again, the argument of job preservation already failed at the stage of sufficient proof of positive effects linked to the merger. The authorisation was then based on extensive obligations reducing the detrimental effect of the concentration on the markets and advantages linked to the merger in the form of international competitiveness and security of supply (see B, III, 3).

f. Holtzbrinck/Berliner Verlag (special report by the monopolies commission)

Important findings on the handling of the job retention argument can also be found in the special report by the monopolies commission with regard to the Holtzbrinck/Berliner Verlag merger. A decision by the Minister is not available because the parties withdrew the application for a ministerial authorisation after the publication of the special report.

These findings include that job preservation can be better achieved through global employment policies so that the ministerial authorisation shall remain a subsidiary instrument and that a cyclical unemployment is not a sufficient ground where it is due to special regional structural long-term underdevelopment.[105]

g. EDEKA/Tengelmann

In contrast to most of the other cases, job preservation is the central question in this application for ministerial authorisation.

Following the monopolies commission - considering the market volumes and turnovers - the restraints of competition on the procurement and sales market is significant. The counter argument of the preservation of 5,700 jobs is not able to outweigh these negative effects. The reasons for this are that there is no sufficient evidence of the long-term preservation of jobs and the fact that there are many alternative interested parties willing to buy Tengelmann branches. Also, the argument that competitors will be under pressure after the merger which might lead to possible job losses weighs against the approval of the concentration.

Nevertheless, the Minister decided - in contrast to the recommendation given by the monopolies commission - that the parties can put the concentration into effect if certain widespread conditions are obtained.[106] Foremost, these conditions include collective labour agreements securing the long-term preservation of jobs.

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[104] Ibid, page 764.
[105] Holtzbrinck/Berliner Verlag page 646.
[106] http://bmwi.de/BMWi/Redaktion/PDF/G/gegenueberstellung-zusagenangebot-edeka-kt-vorgesehene-bedingungen-bmwi,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.

With this - different from earlier decisions - the Minister did not merely dismiss vague promises of job preservation through expected future growth (at the expense of competitors) but showed the parties a list of conditions of how to make the job preservation argument concrete enough and the merger accessible for permission.

h. Conclusion

Undoubtedly, job preservation can under special circumstances function as a common welfare ground and lead to a ministerial authorisation. Nevertheless, it is rarely used as a single argument because it is intertwined with several other factors like rescue mergers and especially international competitiveness. In the case history job preservation was seen as either a means to the end of international competitiveness (Thyssen/Hüller) or as a mere positive extra side effect which comes along with the international competitiveness of a firm (IBH/Wibau; Kali+Salz/PCS). After the Babcock/Artos decision which dealt predominantly with job retention, the recent EDEKA/Tengelmann merger is the first case concentrating on this specific common welfare ground again. Decisions where the parties brought up the argument of job preservation are often concerned not with the weight of the preservation and how it has to be balanced against competition considerations but rather with the proof of a causal link and effective long-term preservation of jobs per se. Often times, the overall positive effect of the merger on the job market itself is put into question by looking at possible job losses, eg in other firms (Babcock/Artos; EDEKA/Tengelmann), the merging firm (Kali+Salz/PCS) or the German economy in general (Thyssen/Hüller) resulting from the concentration. This also reflects the accurate concept of looking at the difference of jobs lost in case of finally prohibiting the merger in contrast to jobs lost after allowing the merger from a macroeconomic perspective instead of only looking at the direct effect on job loss in the merging firms without the merger. The tendency in the ministerial practice to assume that merger are generally aimed at rationalisation and in connection with that at cutting jobs in the long run can be seen critical. Prima facie, it looks like merging companies are put under general suspicion of not upholding the promises made to be granted a ministerial authorisation. This seems to contradict the obligation of the Minister to decide every single case dependant on its own specific facts and circumstances. Nevertheless, the Minister has to face practical realities and can therefore refer to general experience. The application of that assumption is therefore a valid method used by the Minister. The argument for high standards of proof being that the parties to critical mergers almost always bring forward the job preservation argument[107] is from my point of view not convincing. The mere fact that the argument is often used does not say anything about the likelihood of it being invalid.

[107] MAN/Sulzer page 254.

But the overall sceptical and restrictive policy towards authorisations on job preservation grounds, especially through the use of high standards of proof, secures that the relationship between the rule and the exception in terms of § 42 ARC is maintained.

The crucial and central aspect of proving the long-term preservation of jobs could be simplified by using an obligation which prohibits the firms from cutting jobs for a certain period of time. But in Germany the Minister is not allowed to order such an obligation. This is due to the general prohibition of continued long-term monitoring which only allows for conditions and obligations containing structural measures, see § 42 II 2 in connection with § 40 III 2 ARC (for more details, see D, III). [108]

2. Rationalisation benefits

Rationalisation benefits are the most important driver of economic growth.[109] They can be categorised as advantages to the economy as a whole if the internal cost-savings cause a certain production to use less production factors or the same amount of factor input to generate a higher product volume.[110]

Like the requirement in the case of job retention, it is necessary that the effects occur with sufficient probability.[111] The Minister declared that rationalisation benefits can only be used very cautious as ground for ministerial approval.[112] Microeconomic benefits can be categorized as rationalisation benefits in the sense of § 42 I ARC if they are of extraordinary significance, especially in connection with the introduction of new production methods or new technologies.[113] Nevertheless, when evaluating the rationalisation benefits, it is to be kept in mind that a trickle-down effect to new innovation, jobs and customers can only be secured through functioning competition on the market.[114] Although the Minister does not elaborate on the rationalisation benefits in Kali+Salz/PCS, it can be drawn from the decision that purely business advantages for the companies are not enough to be seen as a common welfare ground.[115]

Overall, rationalisation benefits have never been used as the main argument for approval. They are generally allocated to the area of merging firms. Transferring them to advantages to the economy as a whole is connected with a huge burden. This seems to be legitimate because although they are an important variable in economic growth, the strengthening of single firms through rationalised work efficiencies also leads to further market power and intensifies the negative structural effects of the merger.

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[108] Lehr op cit (n23) Rn 13; Thyssen/Hüller page 668.
[109] Thomas op cit (n5) Rn 102.
[110] VAW/Kaiser page 703.
[111] VEW/Ruhrkohle, page 188.
[112] MAN/Sulzer page 253.
[113] Ibid page 252-253.
[114] Ibid page 253.
[115] Kali+Salz/PCS page 744.

3. International competitiveness

First of all, the successful business activity of German companies on markets outside Germany itself has positive effects on their specific business. But there are many factors linked to the success of 'national champions' that have a positive effect on other fields. Therefore, the legislator expressively introduced in § 42 I 2 ARC that 'the competitiveness of the participating undertakings in markets outside [Germany] shall also be taken into account'.

Whereas, in IBH/Wibau and MAN/Sulzer, it has been argued for a restrictive interpretation of international competitiveness as a macroeconomic ground for ministerial authorisation so that the concentration has to be necessary for the merging parties to participate permanently in the non-German market,[116] the Minister in E.ON/Ruhrgas introduced that the argument of international competitiveness is not restricted to concentrations necessary for the companies to compete in the market at all but includes the preservation of existing competitiveness as well as the strengthening of a market position in foreign markets.[117] At the same time, he also set the ground rule that the strengthening of market positions of German companies on international markets is generally not allowed at the expense of the emergence or intensification of a market-dominating position within Germany.[118]Also, the Minister stated that it is to be taken into consideration that international competitiveness of German companies might lead to macroeconomic disadvantages and detrimental effects on international competition which might ultimately negatively affect the export focused German economy.[119] The differentiation made by the Minister in Kali+Salz/PCS indicates that international competitiveness on either the European or only non-European international market could be sufficient for an authorisation.

It is questionable why this ground for authorisation has been applied very restrictively[120] since it is the only public interest factor explicitly mentioned by the legislator. If the legislator incorporated § 42 I 2 ARC to clarify that it is possible to include considerations concerning markets outside Germany the interpretation in the cases[121] is valid. It is not so if it was introduced to remind the Minister of the importance of international competitiveness ('national champions') for the common welfare. Indisputably, § 42 I 2 ARC at least obliges the Minister to take international competitiveness into his considerations.[122] In my opinion, there is no indication in the

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[116] IBH/Wibau page 166.
[117] E.ON/Ruhrgas, page 755: main argument for the approval was the purpose to secure a permanent and cost-effective supply of the German market with natural gas.
[118] IBH/Wibau page 165.
[119] MAN/Sulzer page 253.
[120] Bechtold, op cit (n29) Rn 10; Lehr op cit (n23) Rn 8.
[121] Cf BayWa AG/WLZ page 975; IBH/Wibau page 179.
[122] Kallfaß op cit (n25) Rn 8 citing further literature.

law itself or in the legislative materials which supports the very restrictive approach in the older cases and in that way thwarts the deliberate inclusion of that ground in the wording of the law. Hence, the shift of ministerial practice in the E.ON/Ruhrgas case to a broader interpretation and less strict approach was necessary.[123] This does not mean that § 42 I 2 ARC anticipates the result in any way but that the argument is further-reaching than securing the mere survival on foreign markets and has to be evaluated where the positive effects on the performance of the companies on the international market are to be expected.

4. Regional development

This common welfare ground plays only a minor role in ministerial authorisation claims. It is correlated with job retention and numerous other public welfare grounds.

In Kali+Salz/PCS the parties brought forward that an advantage stemming from the concentration is the promotion of the development of East Germany. The Minister did not examine it in detail but stated that this is only a partial aspect of the common welfare grounds of job retention and international competitiveness which he looked at in the case.[124]

5. Evaluation of the case practice

Looking at the before mentioned grounds for ministerial authorisation, it becomes clear that there are rarely single factors standing alone but rather bundles with predominant common welfare considerations which make a case available for approval. It can also be concluded that common welfare grounds need to be of high significance and require a high continuity.[125]

Altogether, the Minister is fairly reluctant to make use of the § 42 ARC exception. While the reasons are acknowledged in general, the claims predominantly already fail at the stage of sufficient proof of probability or the causal link between the concentration and the positive effects. The high burdens imposed on the parties to proof their case are necessary to secure a high level of market structure protection.

Nevertheless, the Minister is not allowed to think in the same categories as the general public looking at the ministerial authorisation as a way for the companies to 'get around the law'.[126] The basic purpose of § 42 I ARC remains to generate public welfare gains which otherwise would have been precluded by the purely competitive assessment of the BKartA followed by a prohibition in terms of § 36 ARC. Authorising a merger is therefore not a favour of the Minister done for the sake of the applying party but a

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[123] See also Bechtold, op cit (n29) Rn 10; Wiedemann/*Scholz*, Rn 176.
[124] Kali+Salz/PCS page 749.
[125] VAW/Kaiser page 701.
[126] Even Sigmar Gabriel recently spoke about the 'bad reputation' of ministerial authorizations in Germany, http://www.bmwi.de/DE/Themen/wirtschaft,did=748620.html.

mechanism provided by the legislator not to neglect the opportunity of enjoying common welfare gains resulting from a concentration with less competitive disadvantages. In conclusion, the Minister should - in cases where this excess of weight exists - not be shy to apply § 42 ARC.

IV. Conclusion

The two-step system works as follows: In the first step, when the BKartA applies § 36 I ARC, it makes a decision between the interest of the parties to merge under consideration of eventual competition advantages on the one hand and the protection of the market from restraints of competition on the other hand which might trickle down to consumer welfare. In the second step, the application of § 42 I ARC by the BMWi leads to the decision between the triad of interests described above.

The prevailing purpose of the second step is to oppose the findings of step one to the public interest considerations of advantages to the economy as a whole and overriding public interests. In addition, a protection of the markets would also serve the interest of third party competitors to act within a functioning market so that this interest is additionally weighing on the side for refusal of a ministerial authorisation.

The system - together with the case practice - has led to the fact that an application for ministerial authorisation together with the public interest argument for approval of the merger is seldom invoked. Although parties never used the option of § 42 ARC regularly, the number of applications even declined with the recent EDEKA/Tengelmann case being the only one within the last 7 years. With this, there is almost no attention drawn to the public interest consideration in today's day-to-day merger practice in Germany.

Because of the great importance of the few cases it is nevertheless pivotal to have a fair and functioning system. Following the case practice, there are three requirements with regard to the common welfare grounds which have to be met in order to qualify for a ministerial authorisation. The advantages need to be of sufficient weight, concrete provable and have a causal link to the intended merger.[127] In the cases, the Minister first looks at the latter two requirements avoiding a complex balancing when it is not decisive for the case at hand. Therefore, little conclusion on the actual balancing of the contradicting factors in detail can be drawn from the case law.

In order to be able to deal with the cases that need to be decided at the point of balancing by weighing the different interests against each, thoughts have to be given to the question at which point the advantages are to be determined 'sufficient' for a ministerial approval. The partly circumvention of this problem by the Minister makes it

[127] Universitätsklinikum Greifswald page 692.

- if anything - even more necessary and worthy to examine. Exemplary, it is useful to look at the most frequently used common welfare ground of job retention.

A first obvious attempt to compare secured jobs to the negative competitive effects is trying to break both consequences down to an economic number or value ('tertium comparationis') which makes it possible to easily decide which factor outweighs the other. As already stated above, there are existing economic models to describe the economic influence of mergers on the market. It is nevertheless dependant on various other factors like the economic strategy of the merged company if and to which extent net welfare losses as the ultimate risk and reason for prohibiting a merger are possible. These losses to society as a whole are more likely to occur where companies have market power. Where companies merge, their losses because of consumers changing to competitors in reaction to price increases (or lessening of production) are partly avoided by integrating one of the competitors in the undertaking. That these evaluations, as well as the benefits on the other side of the scale, are based on assessments of the future development and probabilities makes it even more difficult.

An assessment of the economic value of jobs is even more complicated to determine. In the light of Art 109 II GG, § 1 StabG respectively, the main reason for the high employment and job retention goal is an economic advantage. It is clear that one has to focus on the economic gain for the society and not the individual itself. By retaining a certain number of jobs, the German welfare state is not burdened with additional social benefits. Additionally, taxes and social contributions of the employed are a gain for the national budget. Also, it should be acknowledged that purchasing power of the people within the state and investments are a key driver of the economy. And although not mentioned expressly in the cases decided by the Minister, there are also non-economic factors which come into play when looking at job retention. From my point of view, it not only allowed but necessary to take these side factors into consideration. Through § 42 I ARC, the Minister is not limited to evaluate only economic effects. The Federal Republic of Germany is a welfare state, cf Art 20 and 28 GG. The resulting welfare state imperative requires taking social effects into account. Nevertheless, the social value of secured jobs for individuals and their families resulting from a concentration cannot be decisive as long as it is not of a significant dimension (see 'overriding'). But people nowadays are alert and concerned about mass dismissals and job losses what makes it a question of public moral.[128] This is reflected in Minister Gabriel's speech on the reasons for his decision in the EDEKA/Tengelmann case where he mentions that he

[128] See for example the broad media coverage and public discussion about 'Schlecker-Frauen' which did not evolve around a purely economic analysis, exemplary: http://www.faz.net/aktuell/wirtschaft/unternehmen/drogeriebranche-schlecker-frauen-ohne-schlecker-13939172.html.

especially cares about the people who work as part-time employees with low income.[129] Therefore, social aspects also need to form part of the non-economic considerations of the Minister.

There is surely no definite number of jobs which can be weighed up against a certain degree of competition restraints. The many different factors intertwined in each case make it impossible to establish a general rule. All that can be done and determined is to apply the general rules on balancing described above (see B, II, 3, b, aa) and give sufficient weight to public interest grounds where they are linked with the merger and an occurrence in the future is of high probability. From the case law it can be said that the exemption provision of § 42 I ARC applies and overcomes the § 36 ARC prohibition only in extreme cases. It has been decided in favour of the applying party where either the competition restraint was of little effect (ie Babcock/Artos) or the public interest factor was of significant weight (ie E.ON/Ruhrgas). This general caution to allow mergers for the reasons laid down in § 42 I ARC is in compliance with the primacy of the protection of competition and should generally be upheld. But is desirable, that the Minister goes into the analysis and evaluation of the different factors in necessary detail where parties have proven probable positive common welfare effects of the merger instead of making general assumptions.

The mechanism of continued long-term monitoring which is prohibited in German competition law could help to partly erase uncertainties about positive effects in the future, particularly with regard to job preservation (see for more detail D, III).

Altogether, Germany has a functioning merger review system which puts only little weight on public interest influences. This is reflected in the systematic of the law allowing public interest considerations only on application pursuant to § 42 ARC where the BKartA already prohibited the merger on competitive grounds in the first place. Prohibiting a merger because of negative public interest effects, although it does not trigger competitive concerns is not possible. The reluctance towards the vague terms is reflected in the case law. Sorting out weak cases on grounds of insufficient provability or lack of a causal link seems to be a valid method avoiding a complex as well as uncertain assessment and balancing of advantages and disadvantages. Nevertheless, the Minister is obligated to analyse with necessary depth which set of interests outweighs the other. Common experiences and general assumptions do not make this analysis dispensable. A way of balancing the factors, although not practicable in every case, is to start by evaluating the underlying economic effects resulting from the merger.

[129] http://www.bmwi.de/DE/Themen/wirtschaft,did=748620.html.

C. Public interest influences in South Africa

Public interest influences play a pivotal role in South African merger cases. The public interest test which is incorporated in the competition analysis makes the South African competition law regime worldwide unique with regard to its merger review system.

I. Main elements of competition law in South Africa

The South African Competition Act[130] governing the competition law in South Africa came fully into force on 1 September 1999. It includes provisions dealing with restrictive practices, abuse of a dominant position and merger control.

When looking at competition law in South Africa one always has to bear in mind at what stage of development the legislation was passed[131] and under which conditions the competition authority began to enforce the competition rules. The rules reflect the key concerns in South Africa's society (see in particular section 2 of the Act).[132] S 1(2) in conjunction with s 2 of the Act already makes clear right at the beginning that 'economic, social justice, developmental and transformative objectives' need to be taken into consideration when looking at specific cases.[133]

The goals of competition law in South Africa are laid down particularly in the preamble and section 2 of the Competition Act. It recognises the injustices which resulted from the discriminatory past in this country and accordingly formulates competition policy goals for the future. For the purpose of this paper, it is particularly worth noticing that the preamble speaks of a balancing between 'the interests of workers, owners, and consumers'.

This part is particularly concerned with merger control which is regulated in Chapter 3 of the Competition Act and administered by the Mergers and Acquisitions division of the Competition Commission.

Merger control still plays a very important role in South Africa, which is also due to the still comparatively low notification thresholds.[134] Therefore, a high number of notifications take place each year resulting in a large number of decided merger cases.[135]

Nevertheless, only few cases give rise to competition concerns with a small number of prohibitions standing at the end of merger review processes. This is in line with the

[130] Competition Act No. 89 of 1998.
[131] Sutherland, 3-46: 'the dismantling of apartheid and the establishment of a constitutional democracy'.
[132] 2009 Acta Juridica 185, 193 2009.
[133] 34 Comp.&Int'l L.J. S.Afr. 295, 305 2001.
[134] Sutherland, 8-5.
[135] Ibid, 8-7 and 8-9.

general attempt of South African merger control to only prevent anti-competitive market structures through mergers.[136]

II. South African merger control in detail

S 12 of the Act provides for a definition of a merger. The thresholds determining at which point a merger needs to be notified with the Competition Commission, as an intermediate or large merger, has to be specified by the Minister (see s 11 of the Act) and at the moment lies at R 560m (combined turnover/ asset value), respectively R 80m (target turnover/ asset value)[137].

S 12A then describes the considerations to make before the competent competition authority comes to its final ruling on approving or prohibiting the proposed merger. The analytical framework for the competitive assessment is divided into a two-step procedure. Firstly, it has to be looked at the competitive effects of the merger. In detail, this means that the authority starts off by determining 'whether or not the merger is likely to substantially prevent or lessen competition'[138] on the basis of the factors set out in s 12A (2). In a second step, other factors are to be applied. In case of a substantial prevention or lessening of competition the competition authority applies the factors described in s 12A (1)(a) or if there is no competition effect of concern the ones mentioned in s 12A (1)(b). S 12A (1)(a) is subdivided differing between pro-competitive gains, especially technological and efficiency advantages in (i) and public interest grounds in (ii).[139]

Noticeably, in contrast to Germany, the rationalisation benefits are not part of the public interest test. Following the structure described, they are evaluated in cases of the 'first line of inquiry' (when substantial negative competition effects are assumed) before the public interest concerns come into play.[140] The efficiency argument, shorthanded for 'technological, efficiency or other pro-competitive gain', can turn the initially negative competition analysis into a net gain result. Especially the 'failing firm defence' can outweigh anti-competitive effects. The enhancement of productive or dynamic efficiency may even lead to allowing the merger although there is no definite proof of consumer benefits.[141] But the standards for a successful efficiency defence are set high.[142]

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[136] Ibid, 8-3.
[137] http://www.compcom.co.za/merger-thresholds/.
[138] This is the prioritised step see Harmony Gold Mining Company Limited / Goldfields Limited CT, 93/LM/Nov 04, para 76.
[139] C.f. three enquiries described in Wal-Mart Stores Inc. / Massmart Holdings Limited, 110/CAC/Jul11 and 111/CAC/Jun11, para. 12.
[140] For the requirements of the efficiency defence see 46/LM/May05, para. 112.
[141] Sutherland, 1-60; 46/LM/May05, para. 131.
[142] 83/LM/Jul00, para 98-99.

After the efficiency defence has been raised to offset the negative competition effects, it is still necessary to apply the public interest test pursuant to s 12A (3).[143] But in connection with the public interest test, efficiency can become relevant again in terms of a justification ground.

S 12A (1) (a) (ii) and s 12A (b) both refer to s 12A (3)(a)-(d) where the individual positive public interest grounds are then listed. Following, these grounds apply to both scenarios ('lines of enquiry')[144], which means that they can either be used to justify the authorisation of an anti-competitive merger or cause the prohibition of a merger after a positive competition finding. In the latter case, the merging parties will have the opportunity to justify the negative public interest effects in order to achieve approval in the end.

After the assessment of all relevant factors, including the assessment of the public interest provisions, a decision will be rendered approving (eventually subject to conditions) or prohibiting the merger.

Thereby, historical influences, especially in form of the economic history, play a crucial role in the construction[145] as well as the implementation[146] of the merger control in South Africa.

For competition law as a whole, the Preamble formulates the goal to 'achieve a more effective and efficient economy in South Africa' (see also purpose of the act in s2(a)).

III. Public interest test

As described above, the South African competition law provides for a public interest test in s 12A (3) of the Act. Including this kind of test in the competition assessment is a unique feature of competition law in South Africa.

1. Context of the public interest test

First of all, it has to be clarified how broadly the public interest factors have to be interpreted and implemented when looking at the effects of a merger.

Extending the mere structural approach, merger control is intended to ultimately also protect consumers and consumer welfare which means the reduction in price or an increase in output.[147] Therefore, the point of departure when deciding upon the approval of a merger should be the attempt to enhance rivalry between competitors.[148]

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[143] 41/LM/Jul10, para. 73.
[144] Cf Draft Guidelines 5.5 (see C, IV, 5 for further detail).
[145] Cf 2009 Acta Juridica 185, 187 2009.
[146] 34 Comp.&Int'l L.J. S.Afr. 295, 304 2001.
[147] Sutherland, 1-54, 57; http://www.comptrib.co.za/the-act/competition-act/.
[148] Ibid 1-64.

But the assessment does not end at this point. The Act explicitly names public interest effects in s 12A (3) which cannot be simply ignored (see evaluation in the Wal-Mart case C, IV, 1, e).[149] Complications result from the uncertain relation between s 12A (3) and other parts of the Act.

Several aspects of the public interest grounds in s 12A (3) can be found in the preamble and the purposes of the Act listed in section 2. It is therefore questionable to which extent this can have influence on the application of the public interest test in merger cases. The preamble of the Competition Act formulates the goal of 'regulat[ing] the transfer of ownership in keeping with the public interest'. From my point of view, this shows that the public interest considerations should play a vital role in South African competition law and are intended to be taken seriously as more than just a subordinated theoretical concept in the context of competition concerns.

Also, the role of the purposes in section 2 and their influences on the public interest test are disputed. On the one hand, it can be argued in favour of an effect of section 2 on the public interest test in the form that it gives public interest grounds further impetus.[150] This view is supported by the fact that section 2 of the Act itself states that its purpose is to promote 'competition in order to achieve' the goals listed.[151]

On the other hand, the specific provisions of s 12A (3) are intentionally phrased narrowly for a limited purpose.[152] Including the wide range of goals incorporated in section 2 would lead to a high complexity. The form of the public interest test chosen in the Act being unique, it is additionally more difficult to orientate at foreign competition authorities and their case practice.[153]

Nevertheless, these arguments cannot lead to the conclusion to not include particularities in South Africa and its economic development into the assessment.

In general, it can be concluded that the competition authorities need to take into account serious distributional considerations.[154] The public interest grounds cannot be interpreted in an 'infinitely elastic' way but must fit into the definitions of the Act.[155] At least, section 2 can be helpful when determining the role of the public interest criteria in the merger analysis.[156]

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[149] Cf Wal-Mart Stores Inc. / Massmart Holdings Limited, 110/CAC/Jul11 and 111/CAC/Jun11 discussed below.
[150] Sutherland, 1-56.
[151] Sutherland, 1-56.
[152] Ibid, 1-56.
[153] Ibid, 1-58.
[154] 2009 Acta Juridica 185, 193 2009.
[155] Frey, page 48.
[156] Sutherland, 1-56.

2. Single consideration aspects

As established above, section 12A (3) requires the competition authorities to take interests into consideration that go beyond the mere protection of competition: Reason for the introduction of these public interest grounds is the 'dramatic political events' during the apartheid that made it necessary to include them. [157]

The Act describes in s 12A (3) the four enumerated[158] public interest grounds. These are namely the effect on a particular industrial sector or region; employment; the ability of small businesses, or firms controlled or owned by historically disadvantaged people to become competitive; and the ability of national industries to compete in international markets. Just like the different factors developed through German case law, there is no clear differentiation and possible overlaps of the concepts[159].

After having determined the public interest factors and the scope of possible interpretations, I will now go on analysing the practical application by the competition authorities using the most important cases of interest as examples.

IV. Case studies

For the purpose of this paper, I will concentrate on factors which also play a role in German merger control and therefore have the potential of being comparable with regard to the case practice. In particular, effects on employment will be the in centre of examination. Additionally, I will take a look at the public interest ground described in s 12A (3)(c) which is of particular interest in South Africa and stands exemplary for public policy and the historical influences on competition law in South Africa.

1. Effect on employment s 12A (3)(b)

The public interest concern described in s 12A (3)(b) gives the competition authorities the power to protect levels of employment.[160] The high employment goal is already manifested in s 2(c) of the Act describing the promotion of employment and the advance of the social and economic welfare as a purpose of the act.

Due to the fact that the South African system also allows for mergers to be prohibited on public interest grounds although the concentration is of no competition concerns, the focus in most of the problematic cases lies on the negative effect of retrenchments as a possible consequence of the merger. Positive effects on the employment market, such as the saving or even creation of jobs through the merger, normally only come into question in a second step where the merging parties try to prove a net gain justifying the

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[157] Ibid, 1-62.
[158] Brassey, page 275: 'appears to be limited to the four grounds specified in s 12A (3)'; First/Fox, page 331: 'exclusive list'.
[159] Brassey, page 276.
[160] Sutherland, 10-133.

negative effects. They are especially considered where the merging parties bring forward a failing firm defence.[161]

There are several cases particularly dealing with the effect on employment although the specific public interest effect is not always expressly mentioned in the decision or might be mixed with other public interest concerns. The following cases have employment issues at the heart of the debate.

a. Telkom SA Ltd / TPI Investments / Praysa Trade 1062 (Pty), 81/LM/Aug00

In the Telkom case, one of the Tribunals earlier merger cases, it has been evaluated whether the merger will 'result in the creation or loss of employment'. The Tribunal stated that the result then needs to be weighed against other factors that have to be considered in terms of the Act.[162]

Remarkably, Telkom had already made promises that are congruent with the conditions imposed by the Tribunal. In particular, promises not to retrench employees of the transferred staff or its own employees for 20 months. This means that conditions have been rendered to simply make the promises legally enforceable.

b. Unilever Plc / Competition Commission, 55/LM/Sep01

In line with the Tribunal's findings in other cases, it has been made clear that the decisions have to 'balance impacts on competition with employment impacts' in contrast to other regulatory areas (eg: Labour Relations Act) where such a balancing act is not to be included.[163] The main finding in this case was that negative employment concerns shall first be examined in consultations between the parties and tested for alternative solutions. Therefore, the Tribunal urged the merging parties to submit sufficient information and required them to enter into discussion with the unions to negotiate a mutually satisfactory solution.[164]

The connection between the 'initial' competition test and the public interest concerns is shown by the statement of the Commission that the number of potential job losses will not lead to a prohibition 'as long as there are remedies for the anti-competitive implications of the proposed transaction'.[165]

c. Harmony Gold Mining Company Limited / Goldfields Limited, 93/LM/Nov 04

In regard to legal issues, the case is primarily concerned with the basic conception of the public interest test. The Tribunal stated that 'otherwise' in s 12A (1)(b) means that the public interest test must be applied regardless of the findings on the competition

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[161] Ibid, 10-136.
[162] 81/LM/Aug00, para 39.
[163] 55/LM/Sep01, para 43.
[164] Ibid, para 43.
[165] Ibid, para 36.

analysis in s 12A (2).[166] It was also held that the wording 'can or cannot' does not imply in any case that a merger approval is dependent on a positive public interest test but only requires no substantial negative effect on public interest.

The negative effects brought forward were a 'systemic risk'[167] (this argument was rejected right away) and adverse effects on employment.

Retrenchments have been expected only for high skilled workers. Hence, the Tribunal prohibited retrenchments in the lower level, exclusively allowing job cuts in the categories of employees best equipped to secure alternative employment.[168] In view of the Tribunal, this was sufficient to obviate any substantial public interest concern.

d. Metropolitan Holdings / Momentum Group Limited, 41/LM/Jul10

Following the Tribunal, the merger between the two firms also does not substantially prevent or lessen competition.[169] Again, the public interest issue of negative employment effects caused by an evaluated 'net amount' of 1000 retrenchments is the only concern.

In this decision it has been made clear that in case of substantiality and merger specificity of negative employment effects ('prima facie ground'), the onus shifts to the merging parties to justify the retrenchments.[170] The Tribunal affirmed the onus in this case because the merger fulfilled the requirements of the 'considerable magnitude and [a limited] short term prospect of re-employment'.[171] Therefore, the merging parties tried to justify the retrenchments against the objections of the NEHAWU.

In general, to justify the retrenchments parties have to prove that a 'rational process has been followed to arrive at the determination of the number of jobs to be lost' and the negative effect 'is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act'.[172] The last part especially excludes purely private gains from being valid grounds for justification because the Act requires countervailing **public** interests.[173]

The sources of public interests with which it is possible to justify negative public interest effects need not be limited to those specifically mentioned in section 12A (3).[174] In the decision, the Tribunal lists examples of these factors that are not included in s

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[166] 93/LM/Nov 04, para 37.
[167] Ibid, para 69; in favour of the argument it was referred to the "size of these firms and the importance of the gold mining industry in the economy".
[168] Ibid, para 83.
[169] 41/LM/Jul10, para 60.
[170] Ibid, para 68-69.
[171] Ibid, para 69.
[172] Ibid, para 70.
[173] Ibid, para 71-74, referring to the structure of s 12A and the preamble of the Act.
[174] 41/LM/Jul10, para 75.

12A (3).[175] These are the failing firm defence; the merger as necessity to be efficient and competitive and consumer welfare through lower prices. This list is not enumerative so that it is inevitably followed by the question: what are other possible benefits, do they have to be similar to the grounds listed in the act and how broad are the terms under which other factors can be introduced as an argument.

The parties in the case referred to enhanced growth opportunities, cost synergies and economies of scale which can in parts be seen as public interest grounds outside the scope of s 12A (3).

Looking at the specific circumstances of the case, the Tribunal approved the merger subject to the condition of no merger specific retrenchments for two years with some exceptions for skilled workers.

e. Wal-Mart Stores Inc. / Massmart Holdings Limited, 110/CAC/Jul11 and 111/CAC/Jun11

This case, which ultimately has been decided by the Competition Appeal Court in 2011 is by far the most controversial and popular case in the recent history.

I will start by trying to look at the case from a purely legal perspective, leaving out the highly debated political influences which I will discuss at a later point (see D, II).

After the Tribunal approved the merger (in line with the recommendation of the Commission) describing the merger as of no competition concerns and declaring pre-merger retrenchments as not merger specific and a R100 million investment programme as sufficient to compensate negative public interest effects, the Ministers called for a review and SACCAWU appealed the decision.

The fact that the merger does not raise competition concerns has been uncontested. Therefore, the central arguments evolved around the question whether the merger causes negative public interest effects which make it necessary to prohibit the merger or at least order further remedies.

The review on the procedural aspects has been dismissed by the Appeal Court.[176] The appeal brought up the basic question of whether it has to be looked at more than only the consumer welfare as ultimate objective of merger review ('consumer welfare approach')[177]. The Court stated that of course, weight has to be given to public interest

[175] Ibid, para 77, which has unmodified been transferred into the Draft Guidelines see 8.1.4.4.
[176] 110/CAC/Jul11 and 111/CAC/Jun11, para 84: testing what a 'reasonable decision maker' would have decided.
[177] The Court left open the exact range of factors to consider speaking of "more traditional considerations of consumer welfare" but sympathising with an approach that is also practicable for South African competition authorities, see 110/CAC/Jul11 and 111/CAC/Jun11, para 99.

factors as it is expressly demanded by s 12A (3) of the Competition Act,[178] and by that cautiously embraced a broader view of welfare.[179] In conclusion, the problematic and central question is one of proportionality. In the case at hand, a balance must be found basically weighing positive effects for consumer welfare against possible negative effects to the detriment of employment and small and medium sized businesses.[180] The appeal court tried to solve this lockdown by not deciding between the one or the other but by securing the gains of lower post-merger prices by approving the merger and mitigating the losses of fewer jobs in South Africa by ordering the creation of an investment fund.[181]

Despite the factual arguments in this case, there are two general rules that can be taken from this decision: Firstly, all public interest effects need to be 'substantial' which means that they have to be of considerable weight and secondly, the wording 'substantial' indicates a presumption in favour of merger approval.[182]

Finally, the Court decided on the basis of the particular circumstances of the case that the merger should be approved on the conditions that the over 500 retrenched workers must be reinstated, no further retrenchments will take place for two years, the position of SACCAWU remains guaranteed for at least three years and an investment condition for the benefit of small and medium sized South African suppliers which has been made subject to further specification.

Apart from the legal questions, politics played a major role in the history of the Wal-Mart case. To a great extent, the review and appeal against the Tribunal decision were economically and labour-politically motivated.

The Ministers as parties (see s 18 (1) Competition Act) only have the right to review a decision on procedural grounds. But it seemed that the Ministers tried to use the instrument of review to turn down an unwelcoming decision of the Tribunal for material reasons. This is already shown in the doubts expressed by the Appeal Court regarding the review character of the Minister's complaint.[183] Therefore, it is not surprising that the appeal that has been disguised as a review has been dismissed by the Court.

From a substantive point of view, the Ministers and the SACCAWU were mostly concerned about Wal-Mart's labour policies, particularly non-unionisation strategies, and wanted to protect local suppliers from competing with international rivals[184].

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[178] See also statement of Mr Kennedy on behalf of SACCAWU: "articulated public interest concerns [in s 12A (3)] make[] it clear […] to undertake an examination of factors beyond [the consumer welfare test]", 110/CAC/Jul11 and 111/CAC/Jun11, para 93.
[179] First/Fox, page 342.
[180] 110/CAC/Jul11 and 111/CAC/Jun11, para 100.
[181] First/Fox, page 344.
[182] 110/CAC/Jul11 and 111/CAC/Jun11, para 113, 114.
[183] Ibid, para. 32.
[184] See First/Fox, page 332: 'effect of import substitution on domestic industry'.

Remedies directly aimed at the former concern have been declined.[185] The Appeal Court was right to state that these matters lie outside the scope of competition law and must be dealt with through labour law and collective power. In my opinion, the remedy ordered regarding the competitiveness of South African small and medium sized businesses is preferable to the remedies proposed by SACCAWU. Apart from legal and practicability problems following from a domestic content requirement and import restrictions, it would be the wrong signal for the local businesses to use tools of protectionism in times of globalising economic markets. That protectionism is not the objective of the Act can already be read from s 12A (3) where it says 'ability [...] to become competitive' and not exclusion of foreign competition.

The remedies are trying not to intervene in fields that are reserved to other (control) mechanisms but are aiming to pave the way for an efficient solution for the South African economy and its players which could be called 'help for self-help'.

In the end, the decision can be seen as an example for a sensible compromise which can only be realised through the use of moderate remedies. Whereas less complex and less labour intensive 'all-or-nothing decisions' (approval or prohibition of the merger) will inevitably lead to a win-lose situation in one or the other way, the range of possible remedies open up the opportunity to come to a satisfying result for both sides.

The history of the case shows how closely related particularly that area of competition law can be to politics and current policies. It remains questionable how to evaluate the drastic attempt of political interference with the independent competition authorities (see D, III).

f. BB Investment Company (Pty) Ltd / Adcock Ingram Holdings (Pty) Ltd, Case No 018713

What can be taken from this decision is the interpretation of the 'merger specificity' requirement that is read from s 12A (3) 'merger will have an effect on' and interpreted as a 'nexus associated with the incentives of the new controller'.[186]

Furthermore, - building upon the findings of the Unilever decision - it is the duty of the parties who are planning to retrench jobs to provide sufficient information to the employees or the Commission so that a process of consultation can be duly exercised. This seems to be reasonable to be able to check for alternative solutions with the intent to secure at least some of the jobs in question.[187]

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[185] On grounds of Wal-Mart's history as being hostile to collective bargaining, the Appeal Court decided to impose a condition to protect the existing collective bargaining rights, 110/CAC/Jul11 and 111/CAC/Jun11, para. 172.
[186] BB Investment Company (Pty) Ltd / Adcock Ingram Holdings (Pty) Ltd, Case No 018713, para. 54.
[187] See also 41/LM/Jul10, para. 105.

The merger has been approved with the condition that there will not be any further retrenchments for one year. Problematic was only whether all retrenchments should be prohibited or only merger specific retrenchments. The Tribunal decided to render a remedy following the former. It is disputable whether Tribunal ordered the right remedy. Including merger specific retrenchments in the moratorium prevents from complex differentiation problems at a later stage.[188] But at the same time, it is at the risk to paralyse business strategies of the new entity which should not be underestimated. In the end, the relatively short period of one year makes the decision appear reasonable.

g. Conclusion

Most of the cases do not raise competition concerns[189] and the majority of cases involving a public interest evaluation are concerned with employment issues, in particular the retrenchment of jobs as negative public interest effect. Not only do they form the majority of the cases but also include the most controversial cases of the highest public attention.

The public interest test results in substantial negative effects on the employment where the number of people who might lose their jobs is high. Obviously, this figure is not uniform for all mergers but depends on the context, especially the total workforce of the firms and eventual retrenchment packages.[190] Additionally, the sector as well as the skill level of the workers, ultimately the chances of short term re-employment have influence on the 'substantiality'. While the adverse effect on public interest is always higher where unskilled workers are affected who on the average will stay unemployed for a longer time, it seems to be of special importance in South Africa. In the aftermath of the apartheid policy and the exclusion of the black population from education, South Africa has a large number of unskilled workers. To fight the high percentage of unemployed people among (disadvantaged) unskilled workers, the existing jobs need to be protected willingly to also further promote the goal of equality.

When negative effects on employment are raised in the 'second line of inquiry', the focus lies on the balancing between this negative effect and possible public interest justifications that speak for the approval of the merger although the public interest analysis is not completely isolated from the findings of the initial competition evaluation.

In the first place, the parties then normally try to relativize the negative effect on employment and provide arguments for the positive effects that their economic business strategy might have on the job development. They often present that the number of job

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[188] See reasoning of the Tribunal in Case No 018713, para. 115.
[189] A prominent counter example discussing the substantial lessening of competition is Momentum Group Limited / African Life Health (Pty) Ltd, 58/CAC/Dec05.
[190] 08/LM/Feb02, para 240.

retrenchments is (partly) offset by the job opportunities through business growth, redeployment etc.[191] To put it in a nutshell, the real question turned on a 'jobs lost – jobs saved' argument.[192]

Besides this, there are other public interest factors that can be raised in favour of an approval. Without doubt, the parties can present evidence for the grounds listed in s 12A (3). It is questionable which other grounds can be brought forward. The exemplary, not exhaustive[193] list from the Metropolitan case already gives an indication of further possible grounds outside the scope of the Act. The ground has to be of public interest. Conceivable grounds are those comparable to the failing firm defence, the efficiency and competitiveness argument or consumer welfare. The limits of interpretation of public interest grounds should not be too narrow. The relevance of the argument can subsequently still be weighed accordingly in the evaluation process.

Generally, the merging parties are, if at all, only partly successful in justifying the retrenchments so that the competent competition authority imposes remedies that secure the jobs that are not retrenched on justified grounds. With the focus on employment issues, it is logical to approve the merger in these situations with a condition that obviates the negative effects. Merging parties frequently make proposals for the nature of the condition themselves. Possible remedies are for example the restriction of job losses, a moratorium, providing money for funds and re-employment obligations. In the end, the issue of job losses can and often is being addressed by prohibiting job cuts (for a period of time) leading to a conditional approval.[194]

It is common practice and generally appropriate to restrict the conditions to merger specific retrenchments because there are no substantive reasons to prohibit other retrenchments in the course of a merger review. In prohibiting any job cuts, the competition authority would infringe the entrepreneurial freedom to choose one's own business strategy – the reference to otherwise complex differentiations is not convincing, nor is the emergency solution of a strict time limitation used in the BB Investment case. The authorities have to face challenging tasks and need to expand their qualified staff and enhance their expertise. Simplicity of solutions at the expense of potential gains for the national economy should not be promoted.

These remedies, in particular moratoriums, come with the problematic side effect that they have to be monitored (by the competition authority) which is connected with cost and time consuming administrative expenses, possibly over a period of several years.

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[191] 58/CAC/Dec05, para 79.
[192] Frey, page 59.
[193] See 41/LM/Jul10, para. 77: "Examples for possible public interest justifications […]".
[194] Sutherland, 10-136; Metropolitan Holdings / Momentum Group Limited, 41/LM/Jul10, para. 117: "In most instances employment loss can be mitigated by appropriate conditions".

Looking at it from a general perspective, through the justification mechanism shifting the onus to the merging parties – although there are no competition concerns –, the state regularly intervenes in business strategies where job retrenchments are included. Certainly, this intense focus on the preservation of jobs has its background in the high unemployment rates and relatively weak economy in South Africa. The large expenditure is therefore necessary and adequate. Nevertheless, the competition authorities are well advised to carefully pay attention to the overall economic impacts of the decisions and not lose sight of the bigger picture.

2. Effect on the ability of national industries to compete in international markets s 12A (3)(d)

Also the foundation for the consideration of this effect is already laid down in the Preamble: 'create greater capability and an environment for South Africans to compete effectively in international markets' (see also purpose of the act in s 2(d)).

Parties relatively seldom invoke this public interest ground. Cases in which it has been argued for are Distillers Corporation (SA) Limited / Stellenbosch Farmers Winery Group Ltd. and Tiger Brands Ltd - Ashton Canning Company (Pty) Ltd - Newco - Langeberg Foods International Ashton Canning Company (Pty) Ltd[195].

In the Distillers Corporation case, the public interest grounds in question were international competitiveness and the effect on a particular region on the one side and negative employment effects on the other side.

The Tribunal elaborated that each public interest ground should be viewed in isolation and be tested for substantiality.[196] Only afterwards, the different grounds should be reconciled or balanced which then results in a net conclusion. It emphasised that the analysis generally can be done without balancing because 'opposing interests can travel past one another on the road in their separate lanes'[197]. It was stated that, in contrast to the competition evaluation described in s 12A (2), the legislation does not offer a list of criteria that should be used when evaluating the public interest effect.[198] Therefore, the attempt to provide Guidelines[199] (see C, IV, 5) for the public interest assessment is a step in the right direction.

In conclusion, there are potentially two stages of balancing. The first within the public interest category, weighing different public interest effects. And a second after

[195] 46/LM/May05: a successful efficiency defence made a detailed public interest test evaluation obsolete.
[196] 08/LM/Feb02, para, 217.
[197] Ibid, para. 223.
[198] Ibid, para. 236.
[199] Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998 (as amended), Draft as of 21 December 2015.

concluding a substantial public interest, whether that effect alters the conclusion on the competition grounds.[200]

3. Effect on a particular industrial sector or region s 12A(3)(a)

After the negative competition evaluation in the Tongaat-Hulett Group Ltd / Transvaal Suiker Bpk case[201], the parties raised public interest defences referring to each category listed in s 12A (3), including the effect on a particular region[202]. In particular, the parties elaborated on the positive impact on the Mpumalanga region and the Southern African region through the procurement of imputs from local suppliers and the sale of land.[203] Although these effects seem to have an undoubted positive effect on the region, they did not fulfil the preceding requirements of merger specificity and substantiality, making a balancing between competition and public interest tests obsolete.

In the Anglo American case, a regional public interest effect was brought forward on grounds of proposed investments in the Northern Cape region and knock-on effects on the local economy. [204] Here, it was the lack of certainty and non-binding nature of promises which led to rejection of the argument but was not decisive in the end.

The Tribunal found that the parties in Iscor Ltd / Saldanha Steel (pty) Ltd successfully invoked the failing firm defence resulting in a positive competition finding.[205] Interestingly, the Tribunal additionally examined the positive effect the merger possibly has on the particular industrial sector or region. It stated that the economic life of the West coast region with its firms and individuals are closely connected to the functioning of the plants.[206] Also, the fact that the firm is a good corporate citizen and involved in a number of important social programs weighed for a positive public interest conclusion.

4. Effect on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive s12A(3)(c)

A particularity of South African competition law lies within this historically motivated public interest factor. It is a legislative reaction to the apartheid economic system which led to a high concentration in the economy.[207] Like most of the other public interest considerations, it is also reflected in (the preamble and) s2 of the act, in particular s 2 (f)

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[200] 08/LM/Feb02, para. 245.
[201] 83/LM/Jul00, para 96.
[202] Ibid, para 112.
[203] Ibid, 83/LM/Jul00, para 114.
[204] 46/LM/Jun02, para 141.
[205] 67/LM/Dec01, para 142.
[206] Ibid, para 145.
[207] 2009 Acta Juridica 185, 193 2009.

focussing on the 'increase [of] ownership stakes of historically disadvantaged persons'. It has to be seen in the light of the BEE and BBBEE policies[208].

The difficulty with this public interest concerns can be seen in Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd which was found to be pro-competitive. In a second step, a possible prohibition (or approval with condition) was then taken into consideration looking at a possible negative impact on the public interest factor described in s 12A (3)(c).

In this decision, the public interest evaluation is described as a balancing act between public interest and competition.[209] Although the public interest test is generally independent from the competition assessment, there is an undeniable correlation when deciding upon a merger case.

In s 12A (1)(b) the Act gives a reference how to solve cases of the concurring interests by requiring a **'substantial'** public interest ground.[210] But this is only a first step in the public interest test and indication of relationship to the competition effect. As I already stated above, a sometimes even more complex balancing question rises after the determination of 'substantiality' within the public interest considerations where the merging parties are given the opportunity of justification. Then, an earlier positive competition assessment only plays a minor role in the background of the evaluation of the different public interest effects and their relation to each other. In 'first line of inquiry' cases (cases with negative competition finding), the balancing of competition aspects against public interest concerns is more obvious (see case above).

Conditions were recommended because of the negative impact on the competitive position of Tepco that has been controlled by Thebe, a firm controlled by historically disadvantaged persons. Such conditions, viewed in the light of BEE, can be critical and dangerous for the firms and people that the provision seeks to protect. I support the view of the Tribunal, that empowerment does not mean to maintain the control of historically disadvantaged people over firms at any price, especially where the conditions lead to inappropriate and extreme economic losses for the firm resulting in a **dis**advantage in the end.

It is not the intention of s 12 (3)(c) to let the competition authorities impose conditions or even prohibit commercially prudent decision with the intent of protection where in reality, it is fatal for the economic forthcoming. Therefore, the authorities should be

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[208] These political agendas promote the distribution of wealth across as broad a spectrum of previously disadvantaged South African society as possible and equity ownership and management representation.
[209] 66/LM/Oct01, para 37.
[210] Ibid, para 38.

careful in trying to support historically disadvantaged people when it includes an intervention in a commercial decision.[211]

This 'false paternalism' can hinder firms to achieve the best result possible[212] and in the worst case even discriminate against the people it seeks to protect through the limitation of possible actions.

Therefore, the analysis should be exercised with emphasis on the economic realities to not impose ill-conceived protection measures out of excessive formalism.

Furthermore, the decision contained an important finding on the extent of the regulatory area of competition authorities in comparison to other authorities. It is said that competition authorities are supposed to 'defend [..] the public interest listed in the Act, at most, secondary to other statutory and regulatory instruments' and not to 'pursue their public interest mandate in an over-zealous manner'. [213] Nevertheless, the Tribunal in Metropolitan/Momentum made clear that a deferential approach does not mean a hands-off approach.[214]

Ultimately, the Tribunal – in contrast to recommendation by the commission - granted an approval without conditions.

5. Draft Guidelines

The economic development department (in particular the Competition Commission itself[215]) is currently making an attempt to help the competition authorities by specifying the terms of the assessment of the public interest test and at the same time making decisions based on public interest evaluations more transparent for merging parties and competitors as well as consumers. Therefore, it has released draft guidelines on the assessment of public interest provisions[216]. These guidelines are structuring the way in which public interest concerns have to be evaluated and are giving examples for possibly successful public interest arguments.

In the guidelines, the commission's general approach to assess public interest provisions is laid down structuring the assessment in a five-step analysis. First, to look at the effect on a public interest ground, then see if the effect is linked to the merger ('causally related to, or results or arises from') and then determine whether the effect is substantial. Only after this analysis, the commission will go into balancing the factors

[211] Cf 66/LM/Oct01, para 49.
[212] Main goal of the Competition Act is to "promote and maintain competition" see introduction of Section 2.
[213] 66/LM/Oct01, para 58.
[214] 41/LM/Jul10, para 110.
[215] The Competition Commission can prepare guidelines pursuant to section 79(1) of the Competition Act.
[216] Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998 (as amended), Draft as of 21 December 2015.

against each other. In a last step, the commission will 'consider possible remedies to address the substantial negative public interest effect'.

In addition, the guidelines are working with non-exhaustive lists of consideration factors (cf Guidelines 7.2.1.1., 7.2.3.1., 8.1.3.1., 9.1.1.1. etc.) and the tool of presumptive examples (cf Guidelines 8.1.4.4., 9.1.4.3. etc.).

It nevertheless expressly acknowledges that merger cases (always) need to be decided on a case-by-case basis dependent on the facts of the specific case.[217]

The improved transparency – if the guidelines are implemented correctly and consistently in the future – can ultimately lead to a better predictability of the decisions of the competition authorities and more legal certainty. But it has to be kept in mind that the guidelines can only – congruent with its restricted objective – 'indicate the approach the [Competition] Commission is likely to follow'[218].

To make the guidelines as beneficial as possible for both sides of a merger case, the draft guidelines are currently up for comment.[219]

It can only be hoped that the guidelines are as successful as the many examples of guidelines introduced by the European Commission with regard to competition law assessments (eg Guidelines for the assessment of vertical restraints, Guidelines for the assessment of technology transfer agreements[220]) and help both sides to avoid misunderstandings and work together for solutions more effectively.

6. Evaluation of the case practice

The question is how to evaluate the decision practice of the authorities (especially the Tribunal and Competition Appeal Court) described above.

With now 15 years of experience, the South African competition authorities can look at a rich case practice.[221] Although having this much of experience, the South African merger control bodies can only provide some 'rules of thumb' so far.[222] These are now laid down in the Draft Guidelines summarising the essential doctrines that can be taken from the casuistry of the competition authorities.

In fact, the public interest test only forms a relatively small part in most of the merger reviews. This is due to the primarily focus on the initial competition analysis at the

[217] See Guidelines Preface 1.3 and Discretion 11 which also allows for the consideration of other factors.
[218] Guidelines Objectives 4.1.
[219] The deadline for submission of comments is the 29th of January 2016.
[220] Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements.
[221] See Activity Update, http://www.compcom.co.za/merger-and-acquisition-activity-update/.
[222] Frey, page 44.

beginning of the evaluation.[223] Moreover, it makes sense because the majority of the proposed mergers do not raise competition concerns. Consequently, the only duty of the authority is then to deny (or more comprehensive to determine and balance) a negative **substantial** public interest impact as an effect of the merger.

In many of the problematic cases, the focus lies more on the weighting of different public interest factors against each other,[224] which is not less challenging than to balance competition and public interest factors. The public interest grounds do not always point to the same net conclusion but may lead to opposing conclusion making an internal weighing up necessary before turning to the overall balancing task.[225]

Especially employment issues are often imposed as a factor of negative public interest impacts adverse to competitive unobjectionable merger.

Where such a balancing of competition and public interest effects is necessary, the South African merger control faces similar problems as the German does. Also the South African competition authorities have to acknowledge that the value-laden norms and standards of the public interest test are generally incommensurable and therefore make it difficult if not impossible to find an 'elusive balance between public interest and competition'.[226] One attempt to make balancing more accessible would be to aim at a singular standard, for example allocative efficiency or total welfare; but the diversity of competition law goals, especially in South Africa make it almost impossible to break everything down to one standard.[227] It is difficult to give political goals an economic welfare value in order to balance them against competition effects. Furthermore, this attempt could lead to a dilution of the non-economic goals of the South African Act such as the promotion of equality. Nevertheless, economic considerations as 'the point of departure should play an important role in performing this balancing act'.[228]

Through the structure of the merger analysis starting with the pure competition evaluation, the public interest test is conducted through the filter of the findings on the first step.[229] While the Tribunal frequently declined to exercise an actual face to face balancing, it also stated that the two analyses are not 'separate and distinct' but the public interest finding is to be made 'in relation to' the earlier competition study.[230]

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[223] S 12 A (1): the Tribunal "must initially determine" the competition question and "then determine" the public interest.
[224] Sutherland, 10-135.
[225] 08/LM/Feb02, para 214.
[226] Frey, page 44.
[227] Sutherland, 1-66.
[228] Ibid, 1-68.
[229] Lewis, The Role of Public Interest in Merger Evaluation, page 3; 93/LM/Nov 04, para 56 "public interest conclusion is justified in relation to prior competition conclusion"; s 12 A "justified".
[230] First/Fox, page 307, 339.

In addition, Section 2 with its broad range of goals[231] 'should be carefully considered when competition authorities approach evidence, or ponder factual disputes and evenly balanced arguments of conflicting parties'.[232]

Especially the public interest effect on 'employment' is in the centre of attention which correlates with the concerns about employment expressed by the Minister of Economic Development.[233] Where there is such a concern, the competition authorities developed a practice of imposing conditions in order to address the public interest concern (for possible remedies see 8.1.5.2 of the Draft Guidelines).[234] In contrast to the BB Investment case, the authorities changed to an approach of only prohibiting merger specific retrenchments. This financial year alone, eight large mergers have been approved with employment conditions (more than 29 in total).[235] The potential of the other public interest grounds does not seem to be exhausted and leaves room for stronger arguments and more recognition by the competition authorities.

International competitiveness, the effect on particular industrial sectors or regions and the concern described in s 12A (3)(c) (in particular the effect on small businesses) are – in the cases where it has been part of the public interest debate – normally used as positive public interest effect. These effects, when raised in form of public justification grounds are often times submitted together because they are economically interrelated.

In contrast to this, the effect on firms controlled or owned by historically disadvantaged persons, especially when brought forward as negative impact on public interests, is very controversial because conditions based on this concern can easily transform into a disadvantage for the firms. *Frey* claims that 'South Africans [are] willing to pay a supra-competitive cartel price as a cost of bringing historically excluded population into the economic mainstream.'[236] In the Wal-Mart case, it was also discussed whether the benefit of low prices should be shared between the consumers and workers.[237] This shows that public interests can cause a shift away from the purely economic based consumer welfare approach.

Rationalisation benefits which are not a public interest concern represent a special category. It is used as defence against a negative competition evaluation and sometimes finds its way into the justification grounds raised in response to a negative public interest effect.

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[231] In section 2, the purpose section of the Act, public interest criteria are reflected in some sections such as (c), (e) and (f).
[232] Sutherland, 1-62.
[233] See Foreword of the Competition Tribunal Strategic Plan 2015/2016-2019/2020.
[234] First/Fox, page 307, 339.
[235] Competition Tribunal's 16th annual report, page 9.
[236] 41 Harv. Int'l. L.J. 579, 587 2000.
[237] See First/Fox, page 332.

Although the public interests are expressly categorized into different groups by the law, the exact public interest concern and provision that is being looked at in the particular case are often times not named. It can be said that most factors are intertwined and therefore it is not always practicable to artificially divide the analysis into the single concerns. Nevertheless, it is desirable that for the purpose of clarity and transparency the competition authorities upfront name the sections of the Act that are being evaluated in the case at hand.

Overall, the most difficult and challenging aspect for the authorities when looking at a merger is the balancing, which is intercorrelated with an economic analysis of the effects that result from the merger, especially because it includes an assessment of the future.[238]

There will always be the inevitable problem of predicting the future in a system of merger control that intervenes before the implementation of the merger.[239] From my point of view, it is nevertheless the better alternative to a post-merger control with a highly complex divestiture proceeding in the case of prohibition. The decision making in merger cases has become more and more complex over time and important mergers that were in the centre of public attention have put increased focus on the work of competition authorities. The complexity is partly due to the more experienced parties to a merger case in South Africa nowadays that are equipped to go into the details of the case and try to analyse them in more specific economic terms.

The competition authorities have taken up this task and - despite political interference capable of undermining the independence and authority of the competition authorities as seen in the Wal-Mart case[240] - successfully maneuvered themselves through the obstacles and challenges of a worldwide unique and new approach to address the influence of public interest on competition law which resulted in the development of a reasonable and coherent case practice. The authorities are well advised to keep following that track and give considerable weight to public interest concerns, bearing in mind the tremendous importance of a growing economy for South Africa as a whole.

V. Conclusion

The competition authorities have a particularly important role to play in implementing public policies and helping the forthcoming of the nation's economy in a way that pays attention to public concerns at the same time.

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[238] Cf the attempt to provide information to help predict future behaviour and impacts in the Wal-Mart case: First/Fox, page 340.
[239] Sutherland, 8-4.
[240] Cf First/Fox, page 338; Lewis, Enforcing Competition Rules in South Africa: Thieves at the dinner table, page 123.

It is enormously difficult to satisfy the combined goals of competitiveness and development[241] which require a competition analysis under strict antitrust standards on the one and tackling the inequalities of the past on the other side.[242] This extremely challenging task can only be mastered with a certain amount of experience, expertise and enough staff to cope with the increasing number of large and complex merger cases[243] brought before the competition bodies. Particularly in the present times, the stakes for the future of the country are high.

A step into the right direction is the introduction of the Guidelines which provide some instructions for the authorities. Amongst the effects described, the Guidelines can also help to promote a clearly structured and therefore very efficient analysis of the cases. Still, further reinforcement of the staff in numbers and training is inevitable. In addition, the resources available should be spent primarily on the more significant cases.

Because of the systematic leaving the competitive assessment as well as the public interest considerations to the competition authorities, one also has to look at the boundaries and competences of other authorities which might be better suited to deal with the specific issue in question.[244] In contrast to *Frey*, who criticised the authorities to hide behind formalistic arguments, political deference and self-imposed limits[245], I see it more as a cautious approach in regard to 'other regulators'.[246] I consider positive the fact that the competition authorities are not exceeding their competences, claiming to have the power over every aspect connected with competition evaluations and issuing remedies in fields where they do not have sufficient expertise. Nevertheless, it is important that the authorities act consequently and confident where it is necessary. Through the power to prohibit a merger or issue far reaching remedies, the competent authorities can take measures that do not leave them 'toothless'.

The authorities are generally very reluctant to prohibit a merger and almost always try to 'heal' the merger through the use of conditions.[247] This is not a problem in itself because parties who notify a merger with the competition commission normally already examined the probability of a prohibition and therefore refrain from mergers which raise obvious, not surmountable competition or public interest concerns so that they do not even reach the level of merger review. A subsequent problem is the high administrative effort needed to control and supervise the different conditions imposed, especially those which require long-term monitoring. Because of the many remedies that are ordered, the high approval rate does not implicate that the authorities are inactive.

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[241] Or put into other terms: 'efficiency and equality', see 41 Harv. Int'l. L.J. 579, 585 2000.
[242] Frey, page 50.
[243] Competition Tribunal's 16th annual report, page 9: "steady increase in the number of large mergers".
[244] Lewis op cit (n229), page 2.
[245] Frey, page 79: this was in 2006 before important merger cases like Wal-Mart.
[246] Cf First/Fox, page 340.
[247] Cf Ibid, page 339.

Especially in developing countries, an active and confident competition authority is indispensable because (in general), public interest considerations here are of even greater importance.[248] This includes South Africa which still suffers from the politic of the apartheid regime. Public interest considerations have to be given considerable weight because of the important industrial policy goals and the not yet fully reached aim that competition authorities achieve unquestionable credibility and legitimacy.[249] To gain credibility and legitimacy it is necessary to take on popular sentiments and take account of major economic problems and aspirations.[250] Therefore, the development dimension cannot be treated as a second-order matter.[251] The inclusion of public interest factors may help to promote a more effective competition enforcement in the long run.[252]

The historic development and the repercussions of the apartheid regime do not only play a role in the context of section 12A (3)(c) and the public interest ground protecting small businesses and firms controlled or owned by historically disadvantaged persons but also in the evaluation of other public interest grounds like section 12A (3)(a)[253].[254]

The desirable attempt to include this public interest dimension in the framework of a merger analysis requires the competition bodies to give the interests a certain weight or value that turns the vague policy goal into a concrete and tangible factor. Therefore, the core centre of every complex merger case is the economic analysis of the single effects which is illustrated by the exchange of arguments in the Wal-Mart case. There are different economic models[255] that try to capture and explain the impact of a merger.

Based on this observation, the competition authorities need to have an informed understanding of economics and basic economic business models (especially rationalisation strategies). Factors that lie beyond their insight, in particular single business concepts, should generally not be impaired by the authority's interference. This includes that authorities should not be tempted to misuse their power to second-guess commercial decision or influence economic decisions of a firm in a paternalist manner. The authorities only fulfil the task to secure an economic environment so that the firms are able to compete on the markets using their own business strategies.

Competition authorities are not only assigned the task to look at the single merger case but have to think in macroeconomic policy dimensions. The policy priorities of the

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[248] Lewis op cit (n229), page 2.
[249] 2009 Acta Juridica 185, 194 2009.
[250] Lewis op cit (n229), page 2.
[251] OECD Report, page 1.
[252] First/Fox, page 347.
[253] For example the educational sector as pivotal in overcoming inequalities of the past, see Naspers Limited / Educational Investment Corporation Limited, 45/LM/Apr00.
[254] Sutherland, 10-132.
[255] Cf Ibid, 10-52, 53.

Tribunal are aligned with the national priorities, for example the creation of five million new jobs by 2020. In my opinion, this is only possible through growth and competitiveness on the global market which stands in contrast to standstill that exclusively aims at the preservation of the existing jobs at any costs. The authorities need to behave in a far-sighted manner taking account of their responsibility for the functioning of the markets.

With this, the underlying goal of competition law remains that the authorities need to further the promotion and protection of competition and the public interest. It is important to promote national competition through merger control in order to 'prepare' South African firms for the globalized international market. This approach is reflected in the Tongaat case, where the Tribunal took the stance that 'the most aggressive and successful international competitors are those who face robust competition at home'.[256]

The extremely difficult task arising from merger review cases requires looking at a single merger case, the single product market, the overall economic situation, policy goals, the historical influences and consequent inequalities all at the same time. In order to do justice to this task, the competition authorities have to find a balanced approach. It is for them to act with sensitivity using their economic instinct, hold their ground against unlawful political influences without over-interpreting their role by avoiding over-regulation and securing the companies' individual economic sphere.

D. Comparison of the different approaches

I. Structural framework of the public interest test

There are structural differences between the German and the South African approach to the inclusion of public interest factors into the merger review system. Germany on the one side has implemented a two-step system strictly separating the competition analysis from public interest considerations. The second step including public interest factors is not automatically triggered by the notification of a merger case but must be invoked by the merging parties. This system emphasizes the role of the public interests provision as exemption clause that can only qualify to override a contradicting competition analysis in exceptional circumstances. In contrast to the South African Act, the German system also does not allow the prohibition of a merger solely on a negative public interest evaluation. Public interest factors are excluded where the merger does not raise competition concerns. Nevertheless, the concepts are not as different as they might seem to be at first view. In the end, both countries follow the same systematic approach with the primacy of the competition evaluation as starting point followed by an

[256] 83/LM/Jul00, para 116.

ancillary, subsequent public interest test, although the latter is conceptually integrated into the competition analysis in South Africa.

Different from the German public interest test in § 42 ARC which is only invoked if there is significant impediment of effective competition, the South African competition authorities need to consider public interest evaluations regardless of the outcome of the competition analysis. This allows for and indicates the legislator's intention to a broader consideration of public interest factors. It opens up more opportunities to give weight to public policies that aim at the development of the national economy beyond the restricted view on the effects of the merger on the particular product market(s). But at the same time, this also means that mergers in South Africa always have to overcome two hurdles, the competitive and the public interest assessment. In theory, the automatic evaluation of public interest factors in every notified merger case comes with the price of increased investigative efforts and a seemingly overwhelming workload for the authorities in charge which might delay the proceedings even if the merger is rather unproblematic. The evaluation task for the competent authority becomes more complex. But it has to be seen that – in line with s 12 A - a deeper inquiry on the public interest effects is only initiated where there are indication for significant effects. Otherwise, the authority contents itself with the declaration that there are no public interest effects contradictory to the competition finding.

Both systems are results of different overall approaches and therefore give preference to different factors – simplicity and a clear distinction on the one, and a broader inclusion of public interest on the other side.

Additionally, a single-step approach is only practical where both levels are evaluated by the same authority.

II. Decision making power

Germany does not only separate the two evaluation steps but has a 'two-step-two-body' approach. Public interest criteria are only evaluated by the Minister of the BMWi whereas the competence in South Africa completely lies with the competition authorities.

There are several benefits and problems arising from each of the two different concepts.

In South Africa, the competition and the public interest decision including the balancing of the different factors is unified with the competent competition authority without ministerial override.[257] In contrast to the Minister in Germany, the South African Minister has no decision making powers and is left with the possibility to make

[257] Lewis op cit (n229), page 3.

representations on public interest grounds (to the Commission, the Tribunal and the Competition Appeal Court).[258]

The BKartA in Germany is freed from any public interest consideration and is able to focus exclusively on the competitive assessment. The decision making power is split between the two bodies responsible for different evaluation factors. The Minister, bound by the finding that there is a substantial effect on competition, looks at possible public interest effects that contradict these effects on competition. Besides the two decision authorities, the monopolies commission plays a crucial role in making recommendations to the Minister where a Ministerial approval is sought.

In theory, the clear distinction seems to have the favourable feature that each decision body can independently decide upon the question before it. But it is undisputed that the public interest factors have to be evaluated in the light of and balanced against the competition effects. The outcome of the competition assessment is not a definite figure that can easily be offset against public interest effects. It is therefore inevitable that the Minister is well-informed about the effects on competition in order to adequately weight these effects himself. In conclusion, a clear separation in terms of a Minister who is purely concerned with the public interest dimension cannot be made. Hence, it could be more practical to entitle the body that was in charge of the competition analysis to undertake the subsequent analysis in order to avoid duplicated efforts and make use of its expertise.

The core task of the respective authority is not to give too little or too much weight to the public interest factors. On the one hand, it can be expected that the authority evaluating the impact on competition gives sufficient weight to the competition implications of the merger.[259] On the other hand, it could lead to a prejudiced competition authority neglecting potentially important public interest considerations. The case practice in South Africa does not indicate such a predisposition of the competition authorities in favour of clinging to the initial competition finding regardless of any substantive public interest concerns. Nevertheless, the executive might be more suitable to implement industrial policy, in particular in a developing country such as South Africa, to pursue the goal of strengthened selected sectors and interest groups.[260] The common counter argument against Ministerial decision power is that an inexperienced public official might give too much weight to social interests.[261] In the legal reality in Germany, the Minister is rarely confronted with claims for merger authorisation. The small number of approved mergers, although he is not completely

[258] Lewis, The Competition Act 1998 – Merger Regulation, page 3: the exception lies with the decision power of the Minister of Finance in banking mergers.
[259] Lewis op cit (n229), page 3.
[260] Frey, page 49.
[261] Ibid, page 49.

inexperienced and his decisions are in part based on the legal structure that only allows him to approve a merger under exceptional circumstances, disproves or at least opposes this proposition. For South Africa, the argument against the transfer of decision power to the Minister is weakened by the fact that the South African authorities by now are fairly experienced in the field of merger control not unnoticed by the Ministers although the events in the Wal-Mart case show a different picture.

In fact, the Wal-Mart case is only one extreme example to illustrate the importance of an independent decision body that only takes into account the factors prescribed by the law, unaffected by possible political pressure or lobbying. This is crucial to secure legal certainty and to promote the credibility of the deciding authority.

In the exemplary Wal-Mart case, particularly the Minister of Economic Development clearly did not respect the boundaries prescribed by law trying to politically interfere in the process. The Ministers (for Economic Development, Trade and Industry and Agriculture, Forestry and Fisheries) exceeded their role that is by law restricted to participate as a party before the competition authorities. From the outset of the case, the Minister initiated a parallel proceeding in which he included Wal-Mart and the unions. This not only undermines the authority and the standing of the competent authorities but also impedes the work of the competition authorities. On top of that, the Minister even tried to intervene in the process itself when he was not satisfied with the outcome and handling of the case by the competent and independent competition authorities. Although the competition appeal court ultimately denied the Minister's motions, the attempt to continuously influence the process caused harm to the development of merger review in South Africa. *Lewis* therefore rightfully called this case a 'fiasco'.[262] Not necessarily in terms of the outcomes of the case but at least regarding the credibility and independence of the competition authorities. It also has the potential to unsettle foreign firms like Wal-Mart about investments in South Africa and merging with South African firms when they see themselves being exposed to the risk of unpredictability through the arbitrariness of the Minister. Merger remedies could be viewed as a factual penalty tax on merger transactions of (large) foreign companies and disproportionate concessions in favour of the South African jurisdiction.[263] The probability that the BKartA as the German competition authority is exposed to such influences is low because possible attempts to promote a merger on (questionable) public interest grounds need to shift to the relevant Ministerial level. Thus, the BKartA can concentrate on its work, uninfluenced by other forces and come to an independent finding on the competition effects. Especially where public interests are at stake and the law allows for a wide discretion, the risk of inappropriate political influence and lobbyism is high.

[262] Lewis op cit (n240), page 276.
[263] First/Fox, page 347.

Preventing that these factors can have influence on independent decision bodies must be the target of successful merger control systems.

But this does not automatically lead to the conclusion that the German system is more favourable in this respect. Although, the Minister as a political entity experienced in this field might be better suited to handle political pressure to approve a merger,[264] the possibility of lobbyism on Ministerial level might even be more dangerous.[265] Decision power in the hands of the Minister also bears the risk that the government misuses the authorisation for industrial policies (dirigisme).[266] Also, combinations of personnel between the management of large firms and the state are not unusual. [267] In the light of the above, a possible disadvantage of the procedure described in § 42 ARC could be that it is less transparent and controlled by other forces than the South African court procedures. Where the proceedings occur in a competition tribunal instead of a Minister's office, the arguments are framed and presented differently and it increases the transparency.[268] The court procedure has the evident advantage that it is a judicial process that brings a process into the public that otherwise might be solely exercised in political bargaining.[269] In addition, the South African system allows for the tribunal decisions being reviewed by the competition appeal court.

Nevertheless, the Ministerial process is not a completely uncontrolled process in the discretion of a single person. Firstly, the German Minister has to exercise its power subject to the law (Art 20 III GG). In practice, the true decision power often lies with the monopolies commission ('Monopolkommission'). It is a panel of experts that gives a recommendation based on competition and public interest evaluations to the Minister that is also made public. Therefore, although the Minister is not legally bound by the recommendation, he is in some way 'influenced' by the monopolies commission. It fulfils the function as the 'regulatory conscience' of the German government.[270] The political and public pressure makes it extremely difficult to deviate from the monopolies commission's expert opinion. Exception examples are the highly disputed E.ON/Ruhrgas case and the pending EDEKA/Tengelmann case.

The political considerations are made public through the ministerial approval procedure including a mandatory public hearing. The rareness and public suspicion towards ministerial authorisations cause a media coverage that makes the process subject to

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[264] Gerhardt, page 45.
[265] Lewis op cit (n240), page 128: 'potential abuse of the public interest provisions when employed by an executive power'.
[266] Gerhardt, page 46; this concern especially came up in the VEBA/Gelsenberg and VEBA/BP merger, where the Minister decided contrary to the recommendation of the monopolies commission. But a manifest abuse of his power cannot be recognised in any of the cases.
[267] Gerhardt, page 49, 237: the minister in E.ON/Ruhrgas received a pension from E.ON.
[268] See First/Fox, page 340.
[269] Ibid, page 346; although the German process also requires a public hearing.
[270] Thomas op cit (n5) Rn 176.

public scrutiny. Especially in high priority cases that can have major impacts on the customers, the press and media that are often referred to as the fourth estate, have a controlling power on the Minister. The monitoring effect of the public transparency of the procedure and the subsequent influences on the political decision process are not to be underestimated.

The judicial review of the Ministerial decision is – due to the economic policy influences that cannot be subject to judicial review - limited to a mere review for arbitrariness.[271] In addition, the Minister and his decisions are to a certain extent subject to parliamentary control from the opposition which can intensify the public pressure[272] (see the recent parliamentary question by the 'Grünen'[273]).

Put together, although legally empowered to independently decide to grant or refuse a Ministerial authorisation, the Minister as a politician elected by the people is in fact controlled and monitored by powerful public forces.

In South Africa, the open sessions before the Competition Tribunal make the decision process very transparently and reduce the likelihood of lobbying.[274] Additionally, decisions are published which has the positive effects of developing a competition jurisprudence and educating practitioners in the field of merger control.[275]

It is questionable whether this leads to the conclusion that one system is generally superior to the other and should therefore be adapted by the other state. To answer this question it is not sufficient to only look at the conceptual advantages and disadvantages but the specific circumstances ('legal reality') in the respective jurisdictions and the objectives that are targeted through the use of one or the other systematic approach. The Wal-Mart case does not imply that the system itself is unsuitable for South Africa. Hypothetically, the same case with the decision power regarding sufficient public interest effects lying with the Minister himself probably would have led to even more serious problems stemming from outside factors.[276] The 'fiasco' therefore does not have its roots in an error of the merger review system but the failure of single persons to adhere to the provisions and misusing their power.

In conclusion, the identity of the decision maker has to be adapted to the situation of the competition authority in the particular state.[277] In Germany, the focus is on securing the independence of the BKartA and its credibility while controlling the Minister mainly

[271] Ibid, Rn 181.
[272] Mattes, page 71.
[273] A German political party; parliamentary question: https://www.bmwi.de/BMWi/Redaktion/PDF/P-R/Parlamentarische-Anfragen/2016/18-7411.pdf.
[274] Lewis op cit (n229), page 3.
[275] Frey, page 49.
[276] Cf Mattes, page 60.
[277] Lewis op cit (n229), page 3.

through the public debate and public pressure.[278] The protection of competitive markets through merger control in Germany is mainly oriented at economic competition standards. It is therefore crucial to have an independent body evaluating the competition effects that is not subject to or suspected of lobbyism. This is best realized through a clear distinction between the authority entrusted with the competition and public interest evaluation, preventing the BKartA from political influences. The few cases in which public interest considerations come into play can effectively be handled by the Minister who is not biased by a previous competition inquiry and more familiar with the political policy dimension determining the weight that should be given to the public interest factors. The abolition of the two-step approach and a general change in the merger control policy putting more emphasis on public interest criteria is not required (see D, III). Furthermore, the policy decision behind it needs to be taken by a politically legitimised body.[279] In South Africa the situation is slightly different because of the inequalities of the historic past and the high unemployment rate that necessitate a stronger focus on public interest influences. Here, where the competition authorities are not as established yet, the need to further improve the credibility and standing of the competition authorities as governmental bodies independent of political influence is even bigger – this is today more than ever necessary to be proven to the public in the aftermath of the Wal-Mart case which called the independence of the competition authorities into question.[280] Splitting the decision making power would require to pass on every merger review case to the Minister to secure a public interest evaluation in each case. This is not practical, nor would it be possible for the Minister[281] to cope with the additional workload. More important, the acceptance of the competition authorities amongst the general public can only be reached if the authorities themselves take on the popular sentiments through the implementation of the public interest provisions.

These considerations make a compelling case for maintaining the different systems in the respective states as they are tailored to the needs arising from the countries' stage of the economic and competition enforcement development.

III. Implementation and remedies

The competent authorities in both jurisdictions are facing similar problems concerning the inclusion of the public interest test in the merger review of an individual case.

At its core, disputed merger cases are ultimately fought by expert economists who try to make the effects on both sides of the balance visible and sizable – especially to quantify

[278] Ibid, page 3.
[279] Mattes, page 51, 294.
[280] Cf Lewis op cit (n240), page 276.
[281] Without a massive expansion of the ministry.

the effect on jobs in South Africa.[282] A great example is the Wal-Mart case, where economists on both sides of the table used economic models to determine the conflated upside and downside effects resulting from the merger. At the same time, it shows how vague these models are, basing the result on indispensable uncertainties and estimations.[283]

But recent years have shown that economic analysis is developing as the merger control as a whole. The requirement to quantify the effects is an incentive to parties to come up with sophisticated approaches,[284] although a certain degree of inaccuracy will always remain.

Based on these economic evaluations, competition authorities will have to balance the generally incommensurable factors against each other. This applies in particular to at least partly economically measurable factors such as those described in the first alternative of § 42 Abs. 1 ARC and less to socio-economical factors. For this, the authorities can make use of different sources of orientation. It has to be kept in mind that it is impossible and undesirable[285] to regulate every single case by law. In general, case practice can be an effective instrument to substantiate questions of balancing and give guidelines. In some areas of public interest concerns, decisions of the competition authorities – in Germany as well as in South Africa – have brought forth general standards that can be applied beyond the single merger case.

The problem in this matter is that the terms are too broad and the consideration criteria as well as the cases vary immensely so that casuistry alone falls short of providing a reliable guideline.[286] All that can be extracted from the cases are therefore some rules of thumb.

Where casuistry alone is not sufficient, the introduction of regulatory guidelines with presumptive examples could provide a helpful source. The introduction of guidelines[287] can be a way out of a complex and inscrutable construct of casuistry. In Germany, the comparable instrument of administrative regulations (‘Verwaltungsvorschriften’) is available to the authorities to introduce such. The side-effect of increased transparency could also help to improve the reputation and strengthen the acceptance of merger decisions by the parties and the general public.

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[282] Cf First/Fox, page 333 ff.
[283] Cf Ibid, page 333-335: *Hodge* coming to the result of roughly 4,000 jobs lost and *Baker* stating that the jobs loss could easily be no more than 1,750 not taking into account the possible job creation effects.
[284] Ibid, page 346.
[285] The provisions of the law must always be flexible enough to include unknown groups of cases; the broad terms of the ARC are more flexible in this regard whereas the enumerative list in South Africa has the advantage of being more concrete and defined.
[286] Often times, undefined terms are refined by administrative and judicial practice.
[287] Which is already taken to the stage of Draft Guidelines in South Africa.

Nevertheless, there are also differences between the two jurisdictions that lead to different degrees of implementation with regard to public interest concerns. Although very similar in the basic concept, the statutory specifications already display the different starting positions for the evaluation of public interest factors by the national authorities. In specific terms, the South African Competition Act includes provisions with defined public interests in contrast to the broad, undefined terms in the ARC.

Although it is certainly true that the inclusion of the specific goals like these described in s 12A(3) make assessments much more complex for the competition authorities, this argument cannot rule out the fact that these considerations are also necessary to be looked at in South Africa at this stage of development. Based on these provisions that 'seek to correct socio-economic disadvantage and distortion which arose as a result of South Africa's discriminatory past'[288], the public interest considerations seem to be taken into consideration less reluctantly and discussed more vividly in comparison to other jurisdictions. One reason for this is, as *Frey* describes it, that public interests in South Africa 'go much deeper and seek to heal much more severe wounds'.[289] Especially, high unemployment and the poor state of the economy have led to prominent public interest considerations in the recent past.[290] Competition authorities in South Africa have the task to care for public considerations on the same level with competition concerns.[291] To the present day, merger practice falls short of the ambitious goals of the Act in terms of economic development and equality. There is a need for emancipation of the competition authorities. Without a confident and independent merger review body acknowledging and promoting the goals laid down in the Act, it is impossible to establish public acceptance and support the future growth of the country.

Nevertheless, I see it less drastically than *Frey* who interprets the Tribunal to have been given up on fighting the inequalities of the past.[292] The instruments to fight against still existing inequalities and economic downfall are available. Although it is not the competition authorities' core competence to compensate the failures of general politics, South Africa's society can only emerge where all governmental bodies make joint efforts. The Wal-Mart case indicated that the competition authorities are not willing to yield to political pressure. This confidence should help to strongly promote the goals of the South African Competition Act in the future.

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[288] 110/CAC/Jul11 and 111/CAC/Jun11, para 93; this can be seen as a clear mandate to the authorities to examine "factors beyond standard questions of a contemplated transaction's impact on price and output".

[289] Frey, page 78.

[290] Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89of 1998, Introduction 3.3.

[291] Frey, page 80.

[292] Ibid, page 79: *Distillers Corporation (SA) Limited – Stellenbosch Farmers Winery Group Ltd* '[…] we cannot use the provisions of the Competition Act to turn the clock back to redeem, ex post facto, the sins of the past […]'.

Although the need to include public interest influences lies more with developing countries such as South Africa, the process in the EDEKA/Tengelmann merger case shows that particularly the public interest factor of job preservation in general is of absolutely great importance, even when the economy and the job market are currently strong[293].

As I noted above, the German merger regime does not need a radical structural change that leads to an automatic inclusion of public interest factors in merger cases. Nonetheless, the Minister should enhance the importance of public interest influences by giving them greater weight in the individual Ministerial authorisation evaluations. Looking exclusively at the success rate[294] of applications for Ministerial authorisation, the Minister seems to attribute high importance to public interest factors. But bearing in mind the small number of applications indicating that the parties in these cases had substantive reasons to believe that the application will succeed changes the view on the situation (overall only 22 applications in 42 years; one every two years).

In contrast, South Africa has not prohibited any merger in the recent past.[295] This is in part a consequence of a different approach to public interest concerns and particularly a different use of remedies. The Guidelines explicitly include the remedies in the review scheme and list the remedies available for the different factors and thereby encourage the use of conditions not only from the perspective of the competent authority but also form the parties' perspective which can come up with possible (conditional) solutions to save the intended merger from being prohibited. Under the South African Act, competition authorities have the possibility to render continued long-term monitoring (used especially with regard to the job preservation argument). The Minister in Germany is only authorised to structural measures. This excludes especially conditions that oblige not to cut jobs within a certain period of time subsequent to the merger.

In favour of the German regulation in § 42 II 2 in connection with § 40 III 2 ARC it can be held that such remedies are not more efficient than the influences of the works council and labour union because they cannot change economic necessities – furthermore, they might even impede structural adjustment processes necessary to secure jobs in the long term.[296]

Nevertheless, in comparison to South African practice, the possibility of approvals subject to conditions has been treated shabbily. A counter example is the recent

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[293] See press release to the economic state of Germany in December 2015, http://www.bmwi.de/DE/Presse/pressemitteilungen,did=746604.html.

[294] Seven of the 21 application (one third) have (partly and/or with conditions) been authorized on public interest grounds.

[295] Cf Competition Tribunal's 16th annual report, page 11: 100% approval rate between 2013 and 2015. http://www.comptrib.co.za/assets/Uploads/Reports/Annual-Reports/Competition%20Tribunal%20Annual%20Report%20LR.pdf.

[296] Babcock/Artos, page 663.

development and the conditions suggested by the Minister Sigmar Gabriel in the EDEKA/Tengelmann case (see B, III, 1, g). Here, the Minister tries to obtain the goal of secured long-term preservation of jobs through obliging EDEKA to enter into collective labour agreements which include a prohibition to lay off more than 5% of the workers. The instrument of collective labour agreements is supposed to secure this goal through the control of labour unions.[297]

The tendency shown by the Minister's considerations in this case should be followed by a generally public interest-friendlier approach that rather uses (extensive) conditions than completely prohibiting a merger. Remedies are often suitable to neutralize competition concerns while maintaining the positive public interest influences. It is then in the hands of the parties if they nonetheless want to implement the merger in fulfilment of the conditions imposed. It could create an environment that encourages parties to make an application for Ministerial authorisation where there are substantial reasons. This would help to modernize the German merger review system as public interest influences become more and more important, not only in developing countries.

E. Final Conclusion

After examining and comparing both systems and their implementation with regard to public interest influences it can be concluded that there are similarities in terms of public interest factors that are considered and problems that arise from the inclusion of these factors in the merger control system.

The broad terms terms in § 42 ARC are open for a wide range of public interest concerns to be raised (cf E.ON/Ruhrgas) yet the most prominent and important is job retention as it can be seen in the controversial EDEKA/Tengelmann case.

South Africa follows a more open approach with an enumerated list of public interest grounds which only in parts deviate from those in the center of discussion in Germany. A significant contrast to Germany is that mergers harmless to competition can be prohibited on public interest grounds. Employment is the predominant ground evoked by the parties. The state-specific concern of bringing disadvantaged people in the economy has to be handled with greatest caution in order not to contradict its fundamental aims.

Both competition regimes face the task of balancing competition and public interest effects. In Germany, proportionality is already required by the GG and reflected in the German case law as the central question of § 42 ARC. In detail, it finds its expression in the burden of proof, especially regarding merger specificity, and other balancing

[297] This can be seen as a legal circumvention of the long-term monitoring prohibition which at the same time avoids extensive administrative expenses.

deliberations. A comprehensible appropriateness test in terms of balancing can be approached through the use of rules of thumb provided by the casuistry (in South Africa summarized in the Guidelines) and due orientation towards economic factors and improving economic models as a starting point. In both merger control regimes it can be expected that economists will play an increasingly important role where a balancing task requires to especially weigh the economic outcomes of an intended merger. But in the end, it remains a policy decision for which the competent authority has a certain margin of assessment.

However, both countries are at different stages of their development and have implemented systems that lead to different levels of public interest inclusion. The general systematic and orientation of the merger review meet the needs of the countries' and competition authorities' stage of development and are consistent with the subsequent different approaches towards public interest influences in South Africa and Germany. The differing systematic, with South Africa putting more emphasis on the inclusion of public interest factors is rooted in the history of the country and due to its current stage of development.

At first, the South African approach appears to be an advanced pro-public interest model of the German system. But this view would ignore the policy decision behind the German model intentionally restricting public interest considerations through a formal application requirement. It includes the regulative declaration that competition findings should only exceptionally be revised on public interest grounds. At this time, a general change in the merger control policy to a more public interest friendly approach (based on the South African model) that would be associated with a higher complexity and opacity of the decisions combining both aspects does not appear advisable. The current state of the German economy and society does not trigger the urgent need for a broader inclusion of public interest factors.

On the other hand, the South African system is needed to fight the inequalities of the past. At the same time, it has the potential to make merger cases more complex and requires more resources. Therefore, it is important to adjust the capacities of the authorities in-charged to the possible workload before them.

Against this backdrop, the single- respectively two-body approach should also not be transferred to the other country. Firstly, it is fitted to the system and the resulting number of cases. Secondly, it is customized to the prevailing goals of the respective merger control system, which are particularly the standing of the competition authority in the population and society and a transparent control for South Africa and the unaffected independence of the BKartA in Germany.

Nevertheless, there is room for improvement in both jurisdictions. In Germany, due to a lot of scepticism towards the introduction of the ministerial authorisation from the

beginning, a focus on economic policy and a predefined relationship of rules and exception that binds the Minister, he has remained a very cautious approach towards public interest concerns. Knowing this, parties seldom apply for ministerial approval of a merger. In order to exploit the full potential for the inclusion of public interest influences that are beneficial for all sides, the EDEKA/Tengelmann[298] case should be the starting point of an increasing consideration of remedies in Germany. After Wal-Mart/Massmart, the South African authorities should be even more confident and willing to enforce the ambitious goals of the Competition Act.

As a general conclusion, one always needs to be aware that the different approaches and outcomes are a sign for the fact that the answers to public interest questions immensely depend on the character of the particular economy.[299]

Through its unique features, 'South African competition law is on the cutting edge of new developments'.[300] It will be pivotal how s 12 A(3) will be implemented in the future - not only for South Africa's development. If the competent competition authorities are able to demonstrate the benefits of an inclusion of the public interest test in the merger analysis, South Africa can become a role model for other jurisdictions with existing or newly developing merger control systems. But as I already stressed above, the competition law regimes need to be tailored to the needs of the realities in the respective jurisdiction. Germany, with a strong economy and low unemployment rates[301], does not have the incentive to include public interest factors to the same extent as South Africa. It can put more focus on the stabilization and independence of the BKartA. South Africa's pioneering role will therefore potentially be more influential for states that deal with similar or parallel socio-economic problems.

[298] Extensive conditions have also been used in E.ON/Ruhrgas, page 751 and 1095.
[299] See Lewis op cit (n258), page 3-4.
[300] 2009 Acta Juridica 185, 204 2009.
[301] As well as a strong labour law that protects the workers.

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